TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 253.

ADA F. McDONNELL, PLAINTIFF IN ERROR,

vs.

LLEWELLYN JORDAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

FILED APRIL 6, 1899.

(17,355.)

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INDEX.

	Original.	Print.
Caption	1	1
Petition for removal of cause from probate court	2	1
Affidavit for removal	4	3
Bond on removal	5	4
Order granting petition for removal	6	5
Affidavit of D. D. Shelby	7	5
Exhibit "A"—Letter, Shelby & Walker to probate judge, August 11, 1897	8	6
"B"—Letter, Shelby & Walker to probate judge, August 12, 1897, &c.	9	7
"C"—Letter, Shelby & Walker to probate judge, August 12, 1897	10	7
Affidavit of R. W. Walker	10	8
Intervention of Llewellyn Jordan	11	8
Affidavit of S. S. Pleasants	12	9
Motion to strike from files	13	10
Transcript of proceedings, probate court, Madison county, Alabama.	14	11
Petition of W. E. Jordan to probate will of Mattie Lee Fennell.	14	11
Copy of will of Mattie Lee Fennell	15	12
Notice of hearing on petition to probate	16	12
Contest of will by Ada F. McDonnell	16	13
Contest of will, amended grounds	17	14

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 4, 1899.

	Original.	Print.
Order setting contest for hearing	18	14
Proceedings at drawing of jury	18	14
Hearing on contest of will	19	15
Organization of jury	20	16
Report and discharge of jury	20	16
Continuance of cause	20	16
Amendment to proponent's petition	20	16
Order denying proponent's petition to amend	21	17
Answer of Llewellyn Jordan	22	17
Proof of will	23	18
Order to strike intervention of Llewellyn Jordan from files	24	19
Petition for appointment of special administrator	24	19
Renunciation of appointment as executor by W. E. Jordan	25	20
Certificate to transcript	25	20
Notice of motion to remand	26	21
Petition for writ of certiorari	26	21
Request for copy of record as it existed August 12, 1897	28	23
Order granting petition for certiorari	29	24
Writ of certiorari	30	24
Affidavit of Frank T. Pace, clerk probate court, Madison county	31	26
S. M. Stewart, probate judge, Madison county	32	26
Answer of S. M. Stewart, probate judge, to certiorari	34	28
Exhibit "A"—Letter, probate judge to Shelby & Walker, September 7, 1897	36	29
Transcript of proceedings in probate court, Madison county	38	30
Petition of Walter E. Jordan	38	30
Copy of will	39	31
Notice of day for hearing	40	32
Contest of will	40	32
Amended contest	41	33
Order setting for hearing	42	33
Proceedings at drawing of jury	42	34
Hearing on contest of will	43	34
Organization of jury	44	35
Report of jury	44	35
Continuance	44	35
Amendment to petition of proponent	44	35
Order denying petition to amend	45	36
Answer of Llewellyn Jordan	46	36
Proof of will	47	36
Order to strike intervention from files	47	37
Renunciation of W. E. Jordan, executor	48	38
Petition for special administrator	48	38
Certificate to transcript	49	39
Motion to remand to probate court of Madison county	50	40
Affidavit of J. Q. Jamar	52	42
Chas. P. Lane	53	42
R. L. O'Neal	54	43
Henry McDonnell	55	44
J. M. Massingale	55	44
Daniel Coleman	56	45
J. P. Powell	57	45
A. S. Fletcher	57	46

	Original	Print
Affidavit of Luke Matthews	58	46
W. F. Garth	59	47
Hearing on motions to strike from files and to remand	59	47
Order denying motions	60	48
Certificate to Supreme Court of the United States of question of jurisdiction	61	48
Mandate from Supreme Court of the United States	62	49
Motion to strike from files, and motion to remand	64	50
Motion of contestee to strike above motions from files	65	51
Order granting motion of contestee	65	51
Order denying motion for continuance	66	52
Organization of jury	66	52
Motion to strike intervention of Llewellyn Jordan from files overruled and denied	66	52
Verdict of jury and judgment	67	53
Certificate to Supreme Court of the United States of question of jurisdiction	68	53
Petition for writ of error	69	55
Assignment of errors	70	55
Order granting writ of error	74	58
Writ of error	75	59
Bond on writ of error	76	60
Citation and proof of service	77	61
Order for final adjournment of court	78	61
Certificate of clerk to transcript	79	61

1 THE UNITED STATES OF AMERICA, }
Northern District of Alabama, Northern Division. }

Pleas had at a regular term of the circuit court of the United States for the northern division of the northern district of Alabama, begun and held at the United States court-rooms, in the city of Huntsville, in said division and district, on the second Monday in October, it being the tenth day thereof, in the year of our Lord one thousand eight hundred and ninety-eight—present and presiding, Honorable John Bruce, judge of the district courts of the United States for the middle and northern districts of Alabama, and sitting as circuit judge; Daniel N. Cooper, United States marshal, and N. W. Trimble, clerk—among other proceedings were had the following:

Be it remembered that heretofore, to wit, on the 12th day of August, 1897, came Llewellyn Jordan, contestee, by attorneys, and filed in this court his petition and exhibits thereto, praying for the removal from the probate court of Madison county, Alabama, into the circuit court of the United States for the northern division of the northern district of Alabama of a certain cause therein pending, in which Ada F. McDonnell is contestant and Llewellyn Jordan is contestee, said petition being in words and figures as follows, to wit:

2 *Petition for Removal of Cause from State Court.*

In the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

In the Matter of the Contest of the Will of MATTIE LEE FENNELL, Dec'd.

ADA F. McDONNELL, Contestant, } No. 1652. Law. Petition to Remove Cause so Entitled from State Court.
vs.
LLEWELLYN JORDAN, Contestee. }

To the honorable judges of the circuit court of the United States for the northern division of the northern district of Alabama:

Your petitioner, Llewellyn Jordan, respectfully shows that he is the defendant in the above-entitled suit, which has not been tried, but is now pending for trial in the probate court of the State of Alabama for the county of Madison, and that he desires to remove the same into the circuit court of the United States for the northern division of the northern district of Alabama.

Your petitioner further states that in the above-mentioned suit there is a controversy between a citizen of the State in which said suit is brought and a citizen of another State, to wit, a controversy between your said petitioner, who avers that he was at the commencement of the said suit and still is a citizen of the State of Mississippi, and the said Ada F. McDonnell, who, your petitioner avers, was at the commencement of the said suit and still is a citizen of the State of Alabama, in which State said suit was brought, and that

both the said Ada F. McDonnell and your petitioner are actually interested in said controversy.

Your petitioner further states that he has filed herewith an affidavit that it may be made to appear to the said circuit court that from prejudice and local influence your petitioner will not be able to obtain justice in the said State court or in any other State court to which your petitioner may, under the laws of the State, have a right on account of such prejudice or local influence to remove said cause.

The suit involves title to real estate and personal property and is as follows:

3 The will of Mattie Lee Fennell was filed in said probate court for probate on the 9th day of February, 1897. Said Mattie Lee Fennell was a resident of Madison county, Alabama, and died leaving real estate in said county of the value of more than ten thousand dollars and personal property of the value of more than two thousand dollars. Her next of kin and only heir-at-law is Ada F. McDonnell, a resident citizen of Madison county, State of Alabama. Her sole devisee and legatee is petitioner, Llewellyn Jordan, a citizen of the State of Mississippi. The said will is duly probated by the affidavit of S. S. Pleasants, the only surviving witness to the will. Its due execution was also proven in said probate court by the testimony of witnesses without conflict or contradiction. Said will was filed in said probate court for probate in common form, and is so probated, but no decree has been rendered thereon by said probate court. On the 11th day of February, 1897, as allowed by the statutes of Alabama, Ada F. McDonnell filed in said probate court her contest of the said will in writing, alleging in substance want of testimentary capacity on the part of the said Mattie Lee Fennell, that she was unduly influenced to make said will, and that said will was obtained by the fraud of this petitioner and others acting by his procurement. This contest so instituted by said Ada F. McDonnell is a suit *inter partes* to annul and make void the said will, a decision of which is *res adjudicata* of the validity of said will and conclusive as to the title of the said real and personal estate. If the averments of the said contest so filed by the said Ada F. McDonnell are true, and if they are found to be true by the judgment of the court, the title to the said property will be in the said contestant. If, on the contrary, they are found to be untrue, the title to the said property will be and remain in the contestee—this petitioner. The said will on the failure of said contest is conclusive as a muniment of title. A copy of the pleadings in said cause in said probate court is herewith filed and made part of this petition.

Your petitioner therefore prays that the said affidavit may be accepted as good and sufficient, and that the said suit may be removed into the said circuit court of the United States for

4 the northern division of the northern district of Alabama, aforesaid, and to the end, also, that the said removal may be

perfected, that such orders be made in the premises as the nature of the case may require.

D. D. SHELBY,
R. W. WALKER,
Attorneys for Contestee, Llewellyn Jordan.

UNITED STATES OF AMERICA, }
Northern Division of the Northern District of Alabama. }

I, Llewellyn Jordan, being duly sworn, do say of my own personal knowledge that I am the petitioner in the above-entitled cause; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true.

LLEWELLYN JORDAN.

UNITED STATES OF AMERICA, }
District of Columbia. }

Sworn to and subscribed before me this 29th day of July, 1897, in the District of Columbia aforesaid, where said Jordan personally appeared before me.

[OFFICIAL SEAL.] J. ALTHEUS JOHNSON,
U. S. Commissioner for the District of Columbia.

In the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

In the Matter of the Contest of the Will of MATTIE LEE FENNELL, Deceased.

ADA F. McDONNELL, Contestant, *vs.* LLEWELLYN JORDAN, Contestee. } No. 1652. Law. Cause Pending in State Court. Affidavit to Remove.

UNITED STATES OF AMERICA, }
Northern Division of the Northern District — Alabama. }

I, Llewellyn Jordan, being duly sworn, do say that I am the defendant in the above-entitled cause; that from prejudice and local influence I will not be able to obtain justice in the probate court of the State of Alabama and county of Madison or in any other State court to which the said defendant, your petitioner, may, under the laws of said State, have the right, on account of such prejudice or local influence, to remove said cause.

5 The said Ada F. McDonnell is the wife of Henry McDonnell. She and her husband have lived in Madison county, Alabama, all their lives. Her husband is a practising physician in said county. That he has a large acquaintance in said county; that they and the said Henry McDonnell have exerted and are exerting their influence against affiant, and that they have created such prejudice; that persons holding office in said county have made active efforts to create and have created prejudice against affiant's

said cause, and that from such prejudice and local influence affiant will not be able to obtain justice in said State court or in any other State court to which said cause could be removed; and affiant makes this affidavit of his own knowledge.

LLEWELLYN JORDAN.

UNITED STATES OF AMERICA, *District of Columbia.*

Sworn to and subscribed before me this 29th day of July, 1897, in the District of Columbia, where said Jordan personally appeared before me.

[OFFICIAL SEAL.] J. ALTHEUS JOHNSON,
U. S. Commissioner for the District of Columbia.

Bond on Removal.

In the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

ADA F. McDONNELL, Contestant,
vs.
LLEWELLYN JORDAN, Contestee. } No. 1652. Law.

Know all men by these presents that I, Llewellyn Jordan, as principal, and W. L. Russell, as surety, are held and firmly bound unto Ada F. McDonnell and all other persons whom it may concern in the penal sum of two hundred dollars ($200.00); for the payment of which, well and truly to be made, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions: The said Llewellyn Jordan having petitioned this court for the removal of a certain cause pending in the probate court of Madison county, Alabama, wherein petitioner is defendant and contestee and Ada F. McDonnell is contestant, to the circuit court of the United States for the northern district of Alabama:

6 Now, if the said Llewellyn Jordan, your petitioner, shall enter in the circuit court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed, then this obligation is to be void; otherwise in full force and virtue.

Witness our hands and seals this 12th day of August, 1897.

LLEWELLYN JORDAN. [SEAL.]
W. L. RUSSELL. [SEAL.]

Approved August 12th, 1897.
N. W. TRIMBLE, *Clerk.*

Order Granting Petition.

In the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

ADA F. McDONNELL, Contestant,
vs.
LLEWELLYN JORDAN, Contestee. } No. 1652. Law.

In the matter of the contest of the will of Mattie Lee Fennell.

It appearing to the court from the petition and affidavits herein filed that in said controversy between Llewellyn Jordan, a citizen of the State of Mississippi, and Ada F. McDonnell, a citizen of the State of Alabama, wherein said suit is brought, and it is made to appear to the court that from prejudice and local influence Llewellyn Jordan will not be able to obtain justice in the probate court of Madison county, Alabama, in which said suit is pending, or in any other State court to which the said defendant and petitioner may under the law of the State have the right on account of such prejudice or local influence to remove said cause—

It is therefore ordered that said cause be, and the same is hereby, removed from said probate court of Madison county, Alabama, into this court, and the said cause will be placed on the docket by the clerk of this court.

August 12th, 1897.

JOHN BRUCE, *Judge.*

Endorsed: Filed in clerk's office Aug. 12th, 1897. N. W. Trimble, clerk.

7 *Affidavit of D. D. Shelby.*

In the Circuit Court of the United States for the Northern District of Alabama, Northern Division.

ADA F. McDONNELL, Contestant,
vs.
LLEWELLYN JORDAN, Contestee. } No. 1652. Law.

Before me, Ed. E. Greenleaf, U. S. commissioner, personally appeared D. D. Shelby, one of defendant's and contestee's attorneys, who, being duly sworn, deposes and says: That he has not on this day, August 12th, 1897, filed with the petition the exhibits therein referred to, being a copy of the pleadings in the probate court in said cause before its removal to this court, because he was unable to obtain copies of such papers after making diligent effort to obtain them. On the 4th day of August, 1897, affiant filed in said probate court an intervening petition and answer for Llewellyn Jordan, and then asked Mr. Pace, the clerk of the court, for copies of the pleadings, including said answer. Affiant furnished said clerk with a list of the said pleadings and learned that the clerk

made out copies that day. Affiant is informed that Hon. S. M. Stewart, judge of said probate court, directed the said clerk not to deliver to affiant the said transcripts. Affiant had personal interviews with said clerk and judge and asked for said copies of said papers, but they have not yet been furnished.

Affiant and associate counsel wrote said judge three letters requesting copies of said papers. Copies of the letters so written to said judge are hereby filed, marked "A," "B," "C," and made parts of this affidavit. The original letter, of date August 12th, 1897, was returned to affiant with the note from Judge Stewart endorsed thereon, but affiant up to this time has been unable to obtain the desired transcripts. The said clerk, Mr. Pace, is usually very prompt in the performance of his duties, and on August 12th, 1897, informed affiant that he had already, on August 4th, 1897, made copies of the proceedings which affiant asked for, and that he was ready to deliver them when the probate judge consented. Affiant offered to pay the fees for the said copies asked for. Affiant will again endeavor to obtain copies, and will file them herein as soon as furnished, and on the failure of said probate judge to furnish said copies will duly apply for a writ of certiorari from this
8 court to obtain them.

The said probate judge, at a later hour, 5 o'clock p. m. of this date, offered to give affiant part of said record, but declined to furnish a copy of the intervening petition of Llewellyn Jordan, filed August 4th, 1897. The offer to affiant of part of the record was made after the foregoing affidavit was prepared and ready to be filed in said cause.

D. D. SHELBY.

Sworn to before me this 12th day of August, 1897.

ED. E. GREENLEAF,

[OFFICIAL SEAL.] *U. S. Commissioner.*

EXHIBIT "A" TO FOREGOING AFFIDAVIT.

HUNTSVILLE, ALA., *August 11th*, 1897.

Hon. S. M. Stewart, probate judge, Madison county, Ala.

DEAR SIR: We requested your clerk, Mr. Pace, several days ago to furnish us with a transcript of the record in the case of the contest of Mattie Lee Fennell, deceased. We wish copies of the following papers:

1. The petition filed by Walter E. Jordan.
2. Contest filed by Ada F. McDonnell.
3. The amended contest filed by Ada F. McDonnell.
4. The amendment to the petition filed by Walter E. Jordan.
5. The intervening petition filed by Llewellyn Jordan August 4th, 1897, and endorsed by the clerk of the probate *clerk*, "Filed August 4th, 1897. S. M. Stewart, probate judge," filed on that day with the affidavit of S. S. Pleasants, attached as an exhibit to the intervening petition. We request that you furnish us from the file

in the court copies of these papers. While we have retained copies, we do not desire to use our office copies. The fees for the copies will be paid when the copies are handed to us.

Yours very truly,

D. D. SHELBY,
R. W. WALKER,
Attorneys for Llewellyn Jordan.

9 EXHIBIT "B" TO FOREGOING AFFIDAVIT.

HUNTSVILLE, ALABAMA, *Aug. 12th*, 1897.

Hon. S. M. Stewart, probate judge, Madison county, Ala.

DEAR SIR: Since August 4th, the day we filed the intervening petition and answer for Llewellyn Jordan, we have endeavored to get from your office copies of the pleadings and orders in the Fennell-will contest case. We again ask to be furnished with copies. In our letter of yesterday, to which no response has been made, we enumerated the several papers that we know to be filed in the case. If there are others, we wish copies of all of them.

If the clerical force in your office is so engaged that you cannot make copies, if you will furnish us the original papers filed in the case we will have copies made.

Very truly yours,

D. D. SHELBY.
R. W. WALKER.

Endorsed.

D. D. Shelby.

DEAR CAPT.: This is the first request I have seen. Mr. Pace, who prepared the papers several days since, left for Nashville day before yesterday and returned this morning. I have no desire to hold up any copy requested of paper in this court. Now that Mr. Pace has returned, my force in office, I think, is sufficient to keep up with all reasonable demands. You will please forward him list of any papers you wish copied and oblige,

Yours respectfully,

S. M. STEWART,
Probate Judge.

8, 12, '96—2.30.

EXHIBIT "C" TO FOREGOING AFFIDAVIT.

HUNTSVILLE, ALABAMA, *August 12th*, 1897.

10 Hon. S. M. Stewart, probate judge, Madison county, Ala.

DEAR SIR: Your note to Mr. Shelby just received. The copies of the papers we asked for on August the 4th and which we enumerated in our letter to you of yesterday are as follows:

1. The petition, filed by Walter E. Jordan, to probate the will of Mattie Lee Fennell.
2. The contest of said will, filed by Ada F. McDonnell.
3. An amendment to the contest, filed by Ada F. McDonnell.
4. An amendment to the petition, filed by Walter E. Jordan.

5. An intervening petition and answer, with exhibit attached, filed by Llewellyn Jordan.

6. A renunciation of the right to have letters testimentary issued to him, filed by Walter E. Jordan.

Please be so kind as to inform us whether or not these papers will be furnished to us. We desire them this afternoon, and we believe Mr. Pace has them already copied, with the exception of the last-mentioned paper, which contains only a few lines.

Yours truly,

D. D. SHELBY.
R. W. WALKER.

Endorsed: Filed in clerk's office August 12, 1897. N. W. Trimble, clerk.

Affidavit of R. W. Walker.

STATE OF ALABAMA, }
Madison County. }

R. W. Walker, being duly sworn, says that the annexed two sheets contain a true and correct copy of papers filed in the office of the probate judge of said Madison county, and that the words endorsed on the wrapper, "Filed Aug. 4th, 1897. S. M. Stewart, J. P.," *is* in the handwriting of Frank T. Pace, chief clerk of said probate court.

Affiant further states that on the 7th day of August, 1897, he requested and demanded of the Hon. S. M. Stewart, the probate judge of said Madison county, a certified copy of the annexed papers, offering to pay the lawful charge for such copy, and that said probate judge failed and refused to furnish such copy.

R. W. WALKER.

11 Subscribed and sworn to before me this 17th day of August, 1897.

ED. E. GREENLEAF,
U. S. Commissioner.

[OFFICIAL SEAL.]

Intervention of Llewellyn Jordan.

STATE OF ALABAMA, }
Madison County. }

In the Probate Court of said County.

In the matter of the contest of the probate of the will of Mattie Lee Fennell comes Llewellyn Jordan, named in the amendment to the petition in this cause filed by Walter E. Jordan, and intervenes in said proceeding and files this his answer to the contest of Ada F. McDonnell.

Respondent, for answer to the contest filed by the said Ada F. McDonnell on the 11th day of February, 1897, says that the 1st, 2nd, 3rd, 4th, and 5th grounds thereof are untrue and are denied; and for answer to the additional grounds of contest filed March 22nd,

1897, says that the 6th ground thereof *are* wholly untrue and is denied. (The 7th ground has been stricken out and is therefore not answered.)

Respondent avers that the said Mattie Lee Fennell was of sound mind and disposing memory, and that the averments in the said contest to the contrary are untrue and are denied, and that proof thereof is demanded and required.

The allegations of the said contestant that the said will was obtained and procured by undue influence and fraud are denied and proof thereof required.

Respondent refers to the said original will of Mattie Lee Fennell, on file in said court and in said case, as a part hereof, and files herewith the affidavit of S. S. Pleasants, the surviving witness to said will.

Respondent alleges that the said Mattie Lee Fennell was at the time of her death an inhabitant of Madison county, Alabama, over twenty-one years of age, and that she died on the 25th day of February, 1897, owning real and personal property in said county, having first made said last will on the 12th day of December, 1895. Ada F. McDonnell is her next of kin and only heir had she died intestate. Mattie Lee Fennell was unmarried. Said Ada F. McDonnell is a resident citizen of Madison county, Alabama.

LLEWELLYN JORDAN,
Devisee and Contestee.

12 THE STATE OF ALABAMA, }
Madison County. }

Probate Court, —— Term, 189–, August 4th, 1897.

In the Matter of the Probate of the Last Will and Testament of MATTIE LEE FENNELL, Deceased.

Before me, S. M. Stewart, judge of probate in and for said county, personally appeared in open court S. S. Pleasants, who lives in said county and is known to me, who, having been by me first duly sworn and examined, did and do depose and say on oath that he is a subscribing witness to the instrument of writing now shown to him, and which purports to be the last will and testament of Mattie Lee Fennell, deceased, late an inhabitant of this county, and that said Mattie Lee Fennell, since deceased, signed and executed said instrument on the day the same bears date and declared the same to be her last will and testament, and that affiant set his signature thereto on the day the same bears date as a subscribing witness to the same in the presence of said Mattie Lee Fennell and the other witness, Louis J. Searcy, and that such other witness subscribed his name as a witness in his presence and in the presence of said Mattie Lee Fennell and in the presence of affiant; that said Mattie Lee Fennell was of sound mind and disposing memory, and in the opinion of deponent fully capable of making her will at the time the same was so made as aforesaid. Affiant further states that said Mattie Lee Fennell was on the day of the date of said will of the

full age of twenty-one years and upwards and at her death owned property in said county. Louis J. Searcy is dead.

S. S. PLEASANTS.

Sworn to and subscribed before me this 4th day of August, 1897.

S. M. STEWART,
Judge of Probate.

Endorsed: Answer of Llewellyn Jordan to the contest filed by Ada F. McDonnell. Filed August 4th, 1897. S. M. Stewart, J. P.
Endorsed: Filed in clerk's office August 17th, 1897. N. W. Trimble, clerk.

13 *Motion to Strike from Files.*

In the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

In re Contest of Will, MATTIE LEE FENNELL, Deceased.

This day comes Ada F. McDonnell, by her attorneys, William Richardson and Lawrence Cooper, not waiving any right hereafter to make and enter a motion to remand, and whose appearance is expressly limited to the purpose of this motion, who is the contestant in a certain proceeding now pending in the probate court of Madison county, Alabama, wherein Walter E. Jordan is the proponent and plaintiff and Ada F. McDonnell is the contestant and defendant, to probate a certain instrument in writing, dated December 17th, 1895, and signed M. L. Fennell, and attested by S. S. Pleasants and Louis J. Searcy, as the last true will and testament of the said M. L. Fennell, and moves the court to dismiss and strike from the files the petition of Llewellyn Jordan, which bears this caption: "Ada F. McDonnell, contestant, *vs.* Llewellyn Jordan, contestee; law; petition to remove cause so entitled from State court," and for grounds of motion says:

1st. That no such suit or proceeding has been or is now pending in the probate court of Madison county, Alabama.

2nd. Llewellyn Jordan never has been nor is he now a defendant in any suit or proceeding touching or relating to the contest of the will of Mattie Lee Fennell in the probate court of Madison county, Alabama.

3rd. Llewellyn Jordan, the petitioner, is not authorized under the statutes of the United States, 1887–'88, regulating the removal of causes from State court to the Federal court, to petition this court for the removal of the suit or proceeding had in the probate court of Madison county, Alabama, in the matter of the contest of the will of Mattie Lee Fennell, deceased, to the Federal court; and in support of this motion the said Ada F. McDonnell herewith files, and makes the same a part of this motion, a full and complete transcript of the proceedings had in the probate court of Madison

county, Alabama, touching the contest of the will of Mattie Lee Fennell, deceased.

WILLIAM RICHARDSON,
LAWRENCE COOPER,
Attorneys for Ada F. McDonnell.

Filed in clerk's office Sept. 3rd, 1897.
N. W. TRIMBLE, *Clerk.*

14 *Transcript of Proceedings in Probate Court of Madison County, Alabama.*

THE STATE OF ALABAMA, }
Madison County. }

To the Honorable S. M. Stewart, judge of probate of said county:

The petition of the undersigned, Walter E. Jordan, respectfully represents:

That Mattie Lee Fennell, who was at the time of her death an inhabitant of said county, died on or about the 5th day of February, 1897, leaving real and personal property in said county and State, having first made on the 17th day of December, 1895, her last will and testament, she then being over 21 years old, duly signed and published by her, said Mattie Lee Fennell, and attested by Louis J. Searcy and S. S. Pleasants. A copy of said will is made Exhibit "A" to this petition.

The original will is hereby surrendered to this court. Said testatrix was unmarried. She has no descendants; her mother and father both died before her death. Her sister, Ada F. McDonnell, a resident of said county and State, is her next of kin, and would have been her only heir had she died intestate.

Llewellyn Jordan, a resident and citizen of the State of Mississippi, temporarily residing at Washington, D. C., is named as devisee in said will. Said attesting witnesses reside at Huntsville, Alabama. Petitioner is named in said will as one of the executors thereof. Said Llewellyn Jordan is named as executor. Also petitioner prays that a day may be set for the hearing of this petition, and that due notice thereof be given, as required by law, to the next of kin of said deceased, and that all necessary decrees, orders, and other proceedings may be had and made in the premises as may be necessary to effect the due probate of said will according to law.

W. E. JORDAN.

D. D. SHELBY,
Attorney for Petitioner.

Sworn to and subscribed by the said Walter E. Jordan before me this February 9th, 1897.

S. M. STEWART,
Judge of Probate.

15 Endorsed: Mattie Lee Fennell. Petition to probate will. Filed Feb'y 9th, 1897. S. M. Stewart, J. P. M. B. 24, p. 488, R. B.

Copy of Will.

I, Mattie Lee Fennell, being of sound mind, and knowing the uncertainty of this life do make this my last will and testament.

I. I give devise and bequeath all the property that I may own at my death, whether real, personal or mixed, to my mother, Mrs. M. E. Fennell, to have and to hold during her natural life, and at her death I give devise and bequeath the same to my cousin Llewellyn Jordan, of Washington, D. C., to have and to hold forever in fee-simple.

II. If my mother should die before my death, then I give devise and bequeath all of the property which I may own at my death whether real, personal or mixed to my said cousin, Llewellyn Jordan, in fee-simple.

III. I hereby nominate and appoint said Llewellyn Jordan, and Walter E. Jordan executors of this my will, and direct that they be appointed to act as such without bond.

Signed, sealed, and published as my last will this the 17th day of December, 1895.

(Signed) M. L. FENNEL. [SEAL.]

Signed, sealed, and published by the said Mattie Lee Fennell as her last will and testament in our presence, and we have signed the same as witnesses thereto in her presence, at her request, and in the presence of each other.

(Signed) LOUIS J. SEARCY.
S. S. PLEASANTS.

Endorsed: Copy of will, Miss Fennell. Filed in probate court Feb'y 8, 1897. S. M. Stewart, J. P. Exhibit "A" to petition of Walter E. Jordan.

16 *Notice of Day for Hearing Probate of Will.*

THE STATE OF ALABAMA, }
Madison County. }

To any sheriff of the State of Alabama.

To Mrs. Ada F. McDonnell:

You will please take notice that on the 11th day of February, 1897, a certain paper in writing, purporting to be the last will and testament of Mattie Lee Fennell, was filed in my office for probate by W. E. Jordan, and that the 24th day of February, 1897, was appointed a day for the hearing thereof; at which time you can appear and contest the same if you see proper.

Given under my hand this 11th day of February, 1897.

S. M. STEWART,
Judge of Probate.

Endorsed: State of Alabama, Madison county probate court. Matter of application of W. E. Jordan to probate will of Mattie Lee

Fennell, deceased. Notice to Ada F. McDonnell of day set for hearing. Issued 11th day of February, 1897. Executed by handing a copy of within writ to Mrs. Ada F. McDonnell Feb'y 11th, 1897. O. Fulgham, sh'ff.

Contest of Will.

In the Probate Court.

To the Hon. S. M. Stewart, judge of probate:

Comes Ada F. McDonnell, the wife of Dr. Henry McDonnell, a resident citizen of the county of Madison and State of Alabama, and represents and shows to your honor that she is the sister of Mattie Lee Fennell, deceased, who departed this life on the 5th of February, 1897; that the said Mattie Lee Fennell at the time of her death had no brother or sister except your petitioner.

She represents that she is the sole heir and distributee of the said Mattie Lee Fennell. She further represents that she has been informed and so believes that a certain instrument in writing, dated the 17th day of December, 1895, signed M. L. Fennell and witnessed by Louis J. Searcy and S. S. Pleasants, purporting to be the last true will and testament of the said Mattie Lee Fennell, has been filed in this honorable court, praying an order of this court to admit said paper-writing to probate as the last true will and testament of the said Mattie Lee Fennell.

17

She now here enters this her objection and contest of said writing, purporting to be the will of the said Mattie Lee Fennell, and for grounds of contest alleges and says:

1. Because the instrument purporting to be the will of the said Mattie Lee Fennell was not signed by the subscribing witnesses in the presence of the testatrix.

2. Because the said Mattie Lee Fennell did not sign her name to said paper-writing in the presence of the subscribing witness-.

3. Because the alleged will was not signed by the subscribing witnesses at the request of the testatrix, and the subscribing witnesses did not sign the same in the presence of each other and in the presence of the said Mattie Lee Fennell.

4. Because the said Mattie Lee Fennell, at the time the alleged will was signed and executed, was of unsound mind and memory and not mentally capable of making a will.

5. Because the execution of the will was procured by fraud and undue influence exercised by one Llewellyn Jordan, who is named as the sole devisee in said will, and others operating in his behalf and by his procurement.

The defendant, Ada F. McDonnell, demands a trial by jury.

WILLIAM RICHARDSON,
Attorney for Ada F. McDonnell.

Endorsed: Mattie Lee Fennell. Contest of will by Ada F. McDonnell. Jury demanded by defendant. Filed in probate court this 11th day of Feb'y, 1897. S. M. Stewart, J. P. M. B. 24, p. 490, R. B.

Amended Grounds for Contest.

In the Probate Court.

In the Matter of the Contest of the Will of MATTIE LEE FENNELL, Deceased.

Comes Ada F. McDonnell, contestant, and, by leave of the court first had and obtained, moves the court to allow her to amend the grounds of her contest, in this:

18 6. That said paper propounded is not the last will and testament of the said Mattie Lee Fennell. Said instrument is not her will.

WILLIAM RICHARDSON,
Attorney for Ada F. McDonnell.

Endorsed: Contest will, Mattie L. Fennell. Amended grounds of contest. Filed March 22nd, 1897.

Order Setting for Hearing.

Probate Court, Feb'y 24th, 1897.

Estate of MATTIE LEE FENNELL, Dec'd. Matter Probate Will Continued.

This day having been regularly appointed for hearing the application of W. E. Jordan, proponent, and also to consider in connection therewith the grounds of contest presented by next of kin, Mrs. Ada F. McDonnell—Wm. Richardson, Esq., for defendant, and D. D. Shelby and R. W. Walker, for the plaintiff—all being now in court, and the fact of attorney for Mrs. McDonnell having filed on the 23rd February in this court interrogatories to Columbus Few, Mary Ripley, and Henrietta Sims, all of whom reside in the city of Hendersonville, North Carolina, more than one hundred miles from the city of Huntsville, Alabama, all of whom are claimed to be material witnesses for the contestant in the matter of the contest of the probating of the will of the said Mattie Lee Fennell, deceased, and for reasons satisfactory to the court, the hearing of this matter is hereby continued to the 30th day of March, 1897, and the jury ordered to be drawn on the 20th day of March, 1897, from the box, as in the circuit court.

Proceedings at Drawing of Jury.

In Probate Court, March 20th, 1897.

Estate of MATTIE LEE FENNELL, Dec'd. Matter of Probate of Will Contest.

This being the day heretofore appointed by order of this court entered February 24th, to draw in open court from the jury-box the names of fifteen persons from which to select jury to be empanelled for the purpose of determining whether or not to probate

the will of Mattie Lee Fennell, propounded by W. E. Jordan and contested by Ada F. McDonnell—W. E. Jordon and Attor-
19 neys D. D. Shelby and R. W. Walker, for proponent, and Hon. Tancred Betts represents Wm. Richardson, for contestant—the court proceeded to draw from jury-box the following names:

J. B. Joplin, Gurley.
W. F. Lawler, Gurley.
J. S. Wilson, Whitesburgh.
Geo. Johnson (farmer), Monrovia.
L. H. Carter, Hazel Green.
Branch Fletcher (farmer), Madison.
A. J. Hannah (farmer), Gurley.
J. A. Beasley, Monrovia.
J. C. Nyman, Hurricane.
John Lawler, Maysville.
W. L. Fanning, New Market.
R. A. Givens, Gurley.
J. W. Atchley (farmer), Gurley.
S. H. Floyd, Madison.
B. T. Reagan, Maysville.

The above venire for special jury in matter of contest of will, Mattie Lee Fennell, dec'd, given to sheriff, with instructions to summon above named to appear before this court on 30th day of March, 1897, for purpose hereinbefore stated.

Hearing on Contest of Will.

In Probate Court, March 30th, 1897.

Estate of MATTIE LEE FENNELL, Dec'd. Contest of Will.

This being the day regularly appointed by order of this court, entered on February 24th, 1897, to hear matter of contest of will of Mattie Lee Fennell, deceased, and by order of same date the court proceeded, on 20th day of February, to draw from box 15 names as jurors, from which jury was to be empanelled to try issues in matter of contest of said will.

The challenges and other legal cause the jury being incomplete, court proceeded to draw from box names of eight persons from which jury list will be completed. The following names were drawn in open court:

L. H. Sanderson, farmer, Cluttsville.
W. T. Campbell, Gurley.
James Meeks, Maysville.
John T. Timmons, Whitesburgh.
Samuel Keel, farmer, Poplar Ridge.
B. L. Coyle, Deposit.
J. C. Broyles, Maysville.
C. B. Colburn, farmer, Vienna.

The above venire for special term given to sheriff with orders to serve at once and have persons in court tomorrow, April 1st, at 2 p. m., to which hour court adjourned.

20 In Probate Court, April 1st, 1897, 2 p. m.

The following persons were legally questioned, sworn, and empanelled a jury to try the issues made up in the matter of contest of will of Mattie Lee Fennell, deceased; W. E. Jordan, proponent,

and Ada F. McDonnell, contestant; D. D. Shelby and R. W. Walker representing proponent and William Richardson for contestant:

Jury.

J. B. Joplin,	J. S. Wilson,	John B. Lawler,	George Johnson,
J. C. Nyman,	W. L. Fenning,	L. H. Carter,	R. A. Givens,
J. W. Atchley,	B. T. Reagan,	Wm. Campbell,	Samuel Keel.

Report of Jury.

In Probate Court, April 15th, 1897.

Estate of MATTIE LEE FENNELL, Dec'd. Matter of Contest of Will.

This day comes into court the jury heretofore empanelled on the 30th day of March, before whom the issues — made up and tried in the matter of the contest of the will of Mattie Lee Fennell, deceased (propounded by W. E. Jordan, proponent, and Ada F. McDonnell, contestant), and in open court state that they cannot agree upon a verdict, and that it is useless to detain them longer, the jury being eight in favor of proponent and four for contestant.

The jury is therefore now, by order of this court, discharged and cause continued for rehearing Monday, 6th day of June, 1897.

Continuance until July 6th, 1897.

In Probate Court, June 6th, 1897.

Estate of MATTIE LEE FENNELL, Deceased. Matter of Contest of Will.

This being the day heretofore by order of this court set for rehearing case in matter of contest of will of said deceased, now, for good reasons satisfactory to the court, said cause is continued to 6th day of July, 1897.

Amendment to Petition of Proponent.

In the Probate Court of Madison County, Alabama.

In the Matter of the Application to Probate the Will of
21 MATTIE LEE FENNELL, Deceased, by Walter E. Jordan, Proponent; Ada F. McDonnell, Contestant.

By leave of the court the proponent amends the petition by alleging the following:

"That the said Llewellyn Jordan is the sole legatee and devisee under said will, and is the person really interested in defending the validity of said will and in answering and defending the contest filed in said court to annul and make invalid said will."

The prayer of said petition is amended by adding the following:

"Petitioner prays that citation and all proper notice be given the said Llewellyn Jordan of this case and contest, and that he be made a party defendant to this petition.

W. E. JORDAN, *Proponent.*

Sworn to and subscribed before me this 28th day of May, 1897.

S. M. STEWART,
Judge of Probate.

Endorsed: Petition of probate of will of Mattie Lee Fennell, deceased. Proponent's amendment to petition to probate will. Filed May 28th, 1897. S. M. Stewart, judge of probate.

Order Denying Petition to Amend.

In Probate Court, August 3rd, 1897.

Matter of Petition to Amend. MATTIE LEE FENNELL, Deceased.

In the matter of the petition of W. E. Jordan to make Llewellyn Jordan party defendant to this case, and that citation and all proper notice be given said Llewellyn Jordan as such, heretofore filed with the papers in this case, May 28th, 1897, was set for hearing this August 3rd, 1897.

This day argued by Shelby and Walker for proponent and Richardson and Cooper for contestant. Motion overruled and amendment not allowed; and for reason good and satisfactory to this court the further hearing of this contest continued to Sept. 3rd, 1897.

22 *Answer of Llewellyn Jordan.*

STATE OF ALABAMA, }
Madison County. }

In Probate Court of said County.

In the matter of the contest of the probate of the will of Mattie Lee Fennell comes Llewellyn Jordan, named in the amendment to the petition in this cause filed by Walter E. Jordan, and intervenes in said proceeding and files this his answer to the contest of Ada F. McDonnell.

Respondent for answer to the contest filed by said Ada F. McDonnell on the 11th day of February, 1897, says that the 1st, 2nd, 3rd, 4th, and 5th grounds are untrue and are denied, and for answer to the additional grounds filed March 2nd, 1897, says that the 6th grounds thereof are wholly untrue and are denied. (The seventh ground has been stricken out; is therefore not answered.)

Respondent avers that the said Mattie Lee Fennell was of sound mind and disposing memory, and that the averments in the said contest to the contrary are untrue and are denied, and that proof thereof is demanded and required.

The allegations of the said contestant that said will was obtained and procured by undue influence and fraud are denied and proof thereof required.

Respondent refers to said original will of Mattie Lee Fennell on file in said court and in said cause as a part hereof, and files herewith the affidavit of S. S. Pleasants, the surviving witness to said will.

Respondent alleges that the said Mattie Lee Fennell was at the time of her death an inhabitant of Madison county, over twenty-one years of age, and that she died on the 5th day of February, 1897, owning real and personal property in said county, having first made said last will on the 18th day of December, 1895. Ada F. McDonnell is her next of kin and only heir had she died intestate. Mattie Lee Fennell was unmarried. Said Ada F. McDonnell is a resident and citizen of Madison county.

April 4th, 1897.

LLEWELLYN JORDAN,
Devisee and Contestee.

23 *Proof of Will.*

THE STATE OF ALABAMA, }
Madison County. }

Probate Court, August 3rd, 1897.

In the Matter of the Probate of the Will of MATTIE LEE FENNELL, Deceased.

Before me, S. M. Stewart, judge of probate in and for said county, personally appeared in open court S. S. Pleasants, who lives in said county and who is known to me, who, having been by me first duly sworn and examined, did and do depose and say on oath that he is a subscribing witness to the instrument of writing now shown to him and which purports to be the last will and testament of Mattie Lee Fennell, deceased, late an inhabitant of this county, and that said Mattie Lee Fennell, since deceased, signed and executed said instrument on the date the same bears date, and declared the same to be her last will and testament, and that affiant set his signature thereto on the day the same bears date as a subscribing witness to the same in the presence of said Mattie Lee Fennell and the other subscribing witness, Louis J. Searcy, and that such other witness subscribed his name as a witness in his presence and in the presence of the said Mattie Fee Fennell and in the presence of affiant. The said Mattie Lee Fennell was of sound mind and disposing memory, and in the opinion of the deponent fully capable of making her will at the time the same was so made, as aforesaid. Affiant further states that said Mattie Lee Fennell was on the day of the date of said will of the full age of twenty-one years *of age* and upwards, and at her death owned property in said county. Louis J. Searcy is dead.

S. S. PLEASANTS.

Sworn to and subscribed to before me this 4th day of August, 1897.

S. M. STEWART,
Judge of Probate.

Endorsed: Proof of will. Filed August 4th, 1897. S. M. Stewart, judge of probate.

24 *Order to Strike Intervention of Llewellyn Jordan from Files.*

Estate of MATTIE LEE FENNELL, Deceased.

July Term, 1897.

AUGUST 4TH, 1897.

In this cause a paper, purporting to be an intervention on behalf of Llewellyn Jordan, having been endorsed "filed" by the clerk of this court, without the knowledge of the court, and said paper being so endorsed filed without an order authorizing said Llewellyn Jordan to intervene herein, and the motion made by Walter E. Jordan, the proponent, praying that the said Llewellyn Jordan be made a party defendant having heretofore, on the 3rd day of August, 1897, been overruled and disallowed, it is therefore ordered that said paper purporting to be an intervention of said Llewellyn Jordan be stricken from the files in this cause.

Petition for the Appointment of Special Administrator.

STATE OF ALABAMA, }
Madison County. }

To Hon. S. M. Stewart, judge of probate:

Your petitioner, Ada F. McDonnell, respectfully represents to your honor that her sister, Mattie Lee Fennell, departed this life on or about the 5th day of February, 1897; that at the time of her death she was a resident citizen of the county of Madison, State of Alabama; that she died seized of personal property and real estate situate and being in the county of Madison; that she left a will, the validity of which is being contested in this court; that the collection of rents on decedant's plantation and o her matters pertaining to the interest of her estate require the appointment of a special administrator until letters testamentary or administration have been duly issued. Petitioner represents and shows to your honor that she is the nearest of kin to the said Mattie Lee Fennell, deceased. She therefore prays that your honor will issue to her special letters of administration on the estate of the said Mattie Lee Fennell, deceased, as the law in such cases directs; and she will ever pray.

ADA F. McDONNELL.

I, Henry McDonnell, consent that letters of special administration on the estate of Mattie Lee Fennell, deceased, be granted and issued to my wife, Ada F. McDonnell, the above petitioner.

HENRY McDONNELL.

25 Endorsed: The judge of the court having heard that a petition had been filed in the United States circuit court, northern district, northern division of Alabama, for the removal of this cause, no order will be made upon the above petition.

Endorsed: Matter of estate of Mattie Lee Fennell, dec'd. Petition for letters of special administration. Filed August 17th, 1897. S. M. Stewart, probate judge.

Petition of W. E. Jordan Renouncing Right as Executor.

STATE OF ALABAMA, }
Madison County. }

In the Probate Court.

In the Matter of the Estate of MATTIE LEE FENNELL.

To the judge of said court:

The undersigned, Walter E. Jordan, named in the will of Mattie Lee Fennell as one of her executors, renounces his right to have letters testamentary issued to him. He desires that the said will shall be probated, but that letters testamentary should issue alone to the co-executor named in said will, Llewellyn Jordan.

August 5th, 1897.

W. E. JORDAN.

Certificate to Transcript.

STATE OF ALABAMA, }
Morgan County. }

I, S. M. Stewart, judge of the court of probate in and for the said county and State, do hereby certify that the foregoing 19 pages contain a full, true, and perfect transcript of all the orders, notices, and proceedings had in the probate court of Madison county, Alabama, concerning or relating to the matter of the petition and contest of the will of Mattie Lee Fennell, deceased.

[SEAL.] Given under my hand and seal of office this 3rd day of September, 1897.

S. M. STEWART,
Judge of Probate.

Endorsed: Estate Mattie Lee Fennell, deceased. Filed Aug. 11th, 1897. S. M. Stewart, J. P. C.

Endorsed: Transcript of proceedings in probate court of Madison county, Ala. Filed in clerk's office by contestant's attorney Sept. 3rd, 1897. N. W. Trimble, clerk.

26 *Notice of Motion to Remand.*

In the United States Circuit Court, Northern Division, Northern District of Alabama.

In the Matter of the Contest of the Will of MATTIE LEE FENNELL, Deceased.

To D. D. Shelby and R. W. Walker, attorney-for Llewellyn Jordan :

This is to give you notice, not waiving any rights that our client has under and by virtue of the motion made and filed in this honorable court on the 3rd day of September, 1897, to strike from the files and dismiss the petition of Llewellyn Jordan for the removal from the probate court of Madison county, Alabama, to this honorable court a certain cause pending in said probate court touching and relating to the petition to probate and the contest of the will of Mattie Lee Fennell, deceased; that the undersigned, attorneys of Ada F. McDonnell, at the proper time after the meeting of the court, make a motion in this honorable court to remand said cause to the probate court of Madison county, Alabama.

WILLIAM RICHARDSON,
LAWRENCE COOPER,
Attorneys for Ada F. McDonnell.

Endorsed : Notice of motion to remand. Received copy Sept. 9th, 1897. D. D. Shelby and R. W. Walker, sol'rs for contestee. Filed in clerk's office Sept. 9th, 1897. N. W. Trimble, clerk U. S. circuit court.

Petition for Writ of Certiorari.

Circuit Court of the United States, Northern District of Alabama, Northern Division.

ADA F. McDONNELL, Contestant,
vs.
LLEWELLYN JORDAN, Contestee.

To the honorable judges of said court :

The petition of Llewellyn Jordan respectfully shows to the court : On the 4th day of August, 1897, petitioner, by his attorney, filed in the probate court of Madison county, Alabama, his intervening petition and answer to the contest of the will of Mattie Lee Fennell, filed therein by Ada F. McDonnell. After said petition was duly endorsed filed by the said clerk of said court, petitioner's attor-
27 ney, D. D. Shelby, Esq., requested the clerk to make out a transcript of the pleadings in said cause, including the said intervening petition. Petitioner is informed and believes that the said clerk prepared such transcript, and that the judge of the said probate court directed him not to deliver it to petitioner's attorney. Petitioner's attorney made several written requests for a transcript, including a copy of said intervening petition, and the said probate judge refused to furnish it. These facts were stated in an affidavit

filed in this cause by D. D. Shelby on the 12th day of August, 1897, which affidavit is referred to as a part of this petition. On the 17th day of August, 1897, after this cause had been removed to this court, petitioner's attorney, R. W. Walker, applied to said probate judge to furnish him a copy of said intervening petition and answer, and the said probate judge refused to furnish him a copy thereof.

Petitioner refers to the affidavit of R. W. Walker, filed in this court August the 17th, 1897, and makes the same a part of this petition. On the 4th day of September, 1897, said probate judge handed to petitioner's attorneys, without further request on their part, papers purporting to be transcript from the probate court of said cause, which contained a copy of said intervening petition and answer, but to which said probate judge had added an order striking the same from the files. The said order bore date August 4th, 1897. Petitioner is informed and believes and alleges that this order so dated August 4th, 1897, was not on the probate court minutes, and had not been made on August the 12th, 1897, when this cause was removed to this court. Petitioner is informed that the said probate judge had furnished contestant's attorneys with a transcript of said record so prepared and containing said order on or before Sept. 3rd, 1897, and afterwards tendered said copies to petitioner's attorneys on the 4th of September, 1897, a copy of the same having then been filed herein by contestant's attorneys as an exhibit to a motion made by them. Petitioner's attorneys returned said transcript to the probate judge with a written request to be furnished with a copy of the record as it stood when the order of removal was made.

A copy of this last request is made an exhibit to this petition. It is dated September the 6th, 1897. The said probate judge
28 has failed and refused to furnish petitioner with a transcript of said record as it was when this cause was removed to this court. Petitioner is informed that he is entitled to have filed in this court a copy of the record as it existed when the order of removal was made.

The premises considered, petitioner prays that this court make and enter an order requiring and commanding the Hon. S. M. Stewart, judge of the probate court of Madison county, Alabama, to forthwith certify to this court a full and complete transcript of the pleadings and decrees in the matter of the contest of the will of Mattie Lee Fennell, as the same existed in the said court on the 12th day of August, 1897, when the said contest was removed to this court, including in the said transcript a copy of the intervening petition and answer of Llewellyn Jordan to the contest of the will of said decedent filed by Ada F. McDonnell, and that no order or decree be included in said transcript that was made or entered on the minutes of the court after the 13th day of August, 1897, and petitioner prays for all other and further relief that is proper as the facts stated.

LLEWELLYN JORDAN, *Petitioner.*

D. D. SHELBY,
R. W. WALKER, *Attorneys.*

UNITED STATES OF AMERICA, }
District of Columbia. }

I, Llewellyn Jordan, being duly sworn, depose and say that I have read the foregoing petition, and that the statements thereof made on my own knowledge are true, and that those made on information and belief I believe to be true.

LLEWELLYN JORDAN, *Petitioner.*

Sworn to and subscribed before me this 2nd day of October, 1897.

[SEAL.] A. S. TAYLOR,
U. S. Commissioner.

Letter Requesting Copy of Record as it Existed August 12, 1897.

HUNTSVILLE, ALA., *Sept. 6th*, 1897.

Hon. S. M. Stewart, probate judge, Madison county, Ala.

DEAR SIR: Enclosed we return to you the papers purporting to be a copy of the record in the Fennell will case, which you
29 handed us on Saturday, September the 4th, 1897, at 2.30 o'clock p. m. It contains a copy of the intervening petition of Llewellyn Jordan, which we endeavored so often to obtain from you during the month of August, and which we were forced to furnish to the United States court by a sworn copy, but you have added to the record an order striking the petition from the file, dating it August the 4th, 1897. It is known to us and admitted by you that no such order was on the minutes on August the 12th, 1897, when this cause was removed to the United States courts. This order has been entered by you after the removal of the case, and is therefore no part of the record. The entry of date August 15th, 1897, purporting to show how the jury stood on the trial of the issue between Walter E. Jordan and Ada F. McDonnell, has been entered without authority, as the jury was not polled. We respectfully ask if that entry has not been written in the record since the removal of the cause. The petition of Ada F. McDonnell for letters of special administration was not filed until after the order of removal, and is therefore no part of the transcript. We again respectfully request that you furnish us with a copy of the record as it existed of August 13th, 1897, when the cause was removed to the United States court, and we offer, as heretofore, to pay the fees for such transcript.

Yours very truly and respectfully, D. D. SHELBY.
R. W. WALKER.

Order Granting Writ of Certiorari.

Circuit Court of the United States, Northern District of Alabama, Northern Division.

ADA F. McDONNELL, Contestant,
vs.
LLEWELLYN JORDAN, Contestee.

This cause having been removed to this court by order of the court on August 12th, 1897, and the said contestee having filed a petition herein to obtain an order herein directing the judge of probate of Madison county, Alabama, to certify a transcript in said cause to this court, the said petition and exhibits thereto being duly considered by the court, it is now ordered, adjudged, and decreed that the writ of certiorari issue to the Hon. S. M. Stewart, judge of the probate court of Madison county, Alabama, directing and commanding him to certify to this court a full and complete record of all the pleadings and orders in the case of the contest of the will of Mattie Lee Fennell, which had been filed or made in said cause and entered in the records of said court on the 12th day of August, 1897, when the cause was removed to this court.

October 6th, 1897.

JOHN BRUCE, *Judge.*

Endorsed: Petition for writ of certiorari and order thereon. Filed in clerk's office October 6th, 1897. N. W. Trimble, clerk U. S. cir. court.

Writ of Certiorari.

In the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

ADA F. McDONNELL, Contestant,
vs.
LLEWELLYN JORDAN, Contestee. } No. 1652. Law.

The President of the United States of America to the honorable probate court of Madison county, Alabama, Greeting:

Whereas on the 6th day of October, 1897, the honorable circuit court of the United States for the northern division of the northern district of Alabama did make the following order, to wit:

In the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

ADA F. McDONNELL, Contestant,
vs.
LLEWELLYN JORDAN, Contestee.

This cause having been removed to this court by order of the court on August 12th, 1897, and the said contestee having filed a petition herein to obtain an order directing the judge of the probate court of Madison county, Alabama, to certify a transcript in said cause to this court, the said petition and exhibits thereto being duly considered by the court—

It is now ordered, adjudged, and decreed that the writ *if* certiorari issue to the Hon. S. M. Stewart, judge of the probate court of Madison county, Alabama, directing and commanding him to certify to this court a full, true, and complete record and transcript of all the pleadings and orders in the case of the contest of the will of Mattie Lee Fennell which had been made or filed in said cause and entered in the records of said court on the 13th day of August, 1897, when the cause was removed to this court.

JOHN BRUCE, *Judge.*

October 6th, 1897.

It is therefore hereby commanded that you certify and send
31 the records and proceedings aforesaid to the said circuit court of the United States, together with this writ, so that you may have the same at the United States court-rooms, in the city of Huntsville, in said division and district, on the 11th day of October, 1897, in the circuit court of the United States to be then and there held, that the said circuit court of the United States may cause to be further done thereupon what of right, according to the laws of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States of America, this the 7th day of October, in
[SEAL.] the year of our Lord one thousand eight hundred and ninety-seven.

N. W. TRIMBLE,
Clerk U. S. Circuit Court, etc.

Issued at Huntsville, Ala., October 7th, 1897.

Marshal's Return.

I hereby certify that the within writ was served personally on S. M. Stewart, judge of probate for Madison county, on the 7th day of October, 1897, at his office in the city of Huntsville, and that a true copy thereof was then and there delivered to and left with him.

D. N. COOPER,
U. S. Marshal,
By J. F. LANIER, *Deputy.*

Endorsed: Returned and filed in clerk's office Octo. 7th, 1897. N. W. Trimble, clerk.

Affidavit of Frank T. Pace.

In the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

Personally appeared before me, Ed. E. Greenleaf, U. S. comm'r, Frank T. Pace, clerk of the court of probate for the county of Madison, who is personally known to me, who, being duly sworn, deposes and says that he is the clerk of the court for the county of Madison, State of Alabama; that on the evening of August 3rd, 1897, David D. Shelby gave him the following memorandum of certain papers and proceedings in the matter of the will of Mattie Lee Fennell, of which he desired a transcript. The memoranda was as follows:

1st. The petition filed by Walter E. Jordan to probate the will of Mattie Lee Fennell.

32 2nd. The contest of said will filed by Ada F. McDonnell.

3rd. An amendment to the contest filed by Ada F. McDonnell.

4th. An amendment to the petition filed by Walter E. Jordan.

5th. (Paper to be filed.)

Affiant proceeded at once to make true copies of the papers called for, which were in the probate office. After finishing the transcript down to No. 5 affiant called on David D. Shelby for the "paper to be filed." This was on the 4th of August. Affiant was notified that the paper was not ready, but would be sent to the probate office in a short time. It was but — short time before the paper was handed me, which I marked "Filed August 4th" and signed probate judge's name to the filing. After affiant had marked the paper filed and made a copy of said paper he handed the same to Judge Stewart, and he directed affiant not to include the paper in the transcript asked for without including the order or ruling that he had made on the paper.

FRANK T. PACE.

Sworn to and subscribed before me this 2nd day of October, 1897.

[SEAL.] ED. E. GREENLEAF,
U. S. Commissioner.

Endorsed: Affidavit of F. T. Pace. Filed in clerk's office Octo. 6th, 1897. N. W. Trimble, clerk U. S. circuit court.

Affidavit of S. M. Stewart, Probate Judge.

In the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

Personally appeared before me, Ed. E. Greenleaf, United States commissioner, S. M. Stewart, judge of probate court for the county of Madison, State of Alabama, and who is personally known to me,

and who, being by me duly sworn, deposes and says that on the 3rd day of August, 1897, David D. Shelby left in the probate office the following memoranda of a transcript that he desired made in the Mattie Lee Fennell will case:

1st. Petition filed by Walter E. Jordan to probate the will of Mattie Lee Fennell.

2nd. The contest of said will filed by Ada F. McDonnell.

3d. An amendment to the contest filed by Ada F. McDonnell.

33 4th. An amendment to the petition filed by Walter E. Jordan.

5th. (Paper to be filed.)

The transcript was made out as requested and was ready for delivery on the 3rd day of August, not including "paper to be filed," and on August 4th, 1897, a paper endorsed "Answer of Llewellyn Jordan to the contest filed by Ada F. McDonnell" was handed to Mr. Frank Pace, the clerk of the court, and was by him marked filed. Affiant's attention was called to the paper after the same had been marked filed by the clerk, and he at once made the entry on it as is set forth in the transcript. Affiant further states that a transcript of the memoranda No. 1, 2, 3, and 4 was handed to D. D. Shelby on the 12th of August, 1897, and he refused to accept the same.

On August 14th, 1897, D. D. Shelby presented to affiant a copy of order of Hon. John Bruce, United States judge, ordering the removal of the matter of the contest of the will of Mattie Lee Fennell from the probate court of Madison county, Alabama, into the circuit court of the United States for the northern division of the northern district of Alabama. Without delay affiant caused to be prepared and delivered to the counsel of Llewellyn Jordan a full, true, and complete transcript of all the proceedings, orders, and decrees made by the probate court of Madison county, Alabama, in the matter of the petition to probate and the contest of the will of Mattie Lee Fennell. They declined to accept it. Affiant is ready and willing to deliver the transcript to this honorable court, and offers now to do so.

S. M. STEWART,
Judge of Probate.

Sworn to before me this 7th day of October, 1897.

[SEAL.] ED. E. GREENLEAF,
U. S. Commissioner.

Endorsed: Affidavit of S. M. Stewart, judge of probate. Filed in clerk's office Oct. 7th, 1897. N. W. Trimble, clerk U. S. circuit court.

34 *Answer of S. M. Stewart, Probate Judge, to Writ of Certiorari.*

In the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

ADA F. McDONNELL, Contestant,
vs.
LLEWELLYN JORDAN, Contestee.

The answer of S. M. Stewart, judge of the court of probate for the county of Madison, State of Alabama, to the allegations and statements contained in the petition of Llewellyn Jordan, asking and praying for an order from this honorable court on respondent to certify to this honorable court a full and complete transcript of the pleadings and decrees in the matter of the contest of the will of Mattie Lee Fennell, etc., answering, respectfully represents and shows to the court: The petition filed in the court on the 28th day of May, 1897, by W. E. Jordan, proponent, asking that Llewellyn Jordan be made a party defendant, was heard and discussed by counsel, pro and con, on 3rd of August, 1897, and an order was made by the court overruling the petition and motion to allow Llewellyn Jordan to become a defendant, and entered accordingly on that day. On the 3rd of Aug., David D. Shelby, one of the counsel for proponent in the matter of the contest of the will of Mattie Lee Fennell, presented to the clerk in the probate office the following memoranda of the papers he directed to be copied:

1. Petition filed by Walter E. Jordan to probate the will of Mattie Lee Fernell.
2. The contest of said will by Ada F. McDonnell.
3. The amendment to the contest filed by Ada F. McDonnell.
4. An amendment to the petition filed by Walter E. Jordan.
5. (Paper to be filed.)

A transcript of the papers included in the above memorandum on file in the probate court was made out and handed David D. Shelby, and he refused to accept the same. On the 4th of August, 1897, David D. Shelby presented in the probate court a paper-writing endorsed "Answer of Llewellyn Jordan to the contest filed by Ada F. McDonnell." This paper was marked filed by Frank T. Pace, clerk of the probate court, and dated August 4th, 1897. Respondent here refers to the affidavit of Frank T. Pace, now
35 on file in this honorable court, for a full statement of the facts connected therewith.

The attention of respondent was called to this paper by the clerk, and thereupon respondent, on the 4th day of August, 1897, made an order in writing striking said answer of Llewellyn Jordan to the contest of Ada F. McDonnell from the file. This order was made and entered on the day it purports, viz., the 4th day of August, 1897. On the 14th day of August, 1897, David D. Shelby exhibited to respondent an order made by Hon. John Bruce, judge of the United States district court, etc., ordering that the cause of the pro

ceeding to probate the will of Mattie Lee Fennell be removed from probate court to this honorable court. Respondent at once took steps to have a transcript made out, and on Sept. 3rd respondent, on the request of counsel for Mrs. Ada F. McDonnell, furnished them with a true and perfect transcript of all the orders, notices, and proceedings had in the probate court of Madison county, Alabama, concerning or relating to the matter of the petition and contest of the will of Mattie Lee Fennell, deceased.

Respondent is informed that said transcript was filed in this honorable court on 3rd September, 1897, and was on file in said court at the time that the certiorari was applied for.

On Sept. 4th respondent delivered to the attorneys for Llewellyn Jordan a transcript of all the orders, motions, proceedings, etc., had in the probate court of Madison county, Alabama, concerning or relating to the will of Mattie Lee Fennell.

On Sept. 6th respondent received from said attorneys a letter, a copy of which is made exhibit to the petition for certiorari.

On Sept. 7th respondent replied to said letter, a copy of which is hereto attached, marked Exhibit "A," and the same is asked to be made a part of this his answer. Respondent denies that he failed or refused to furnish the attorneys of Llewellyn Jordan with a transcript of the record as it stood on the 12th day of August, 1897, but, to the contrary, he asserts that he has delivered to said attorneys a full and complete transcript of all the orders, decrees, and proceedings as made and entered and the date of filing.

Respondent, in the discharge of his official duty, has pre-
36 sented to counsel for petitioner a transcript of the record of his court just as he made said record in the progress of said cause, and in compliance with the order of Hon. John Bruce, judge, of date Octo. 6th, 1897, directing that a writ of certiorari issue to respondent, as judge of the probate court of Madison county, Alabama, respondent here now files in this honorable court a full and complete record and transcript of all the pleadings and orders in the case of the contest of the will of Mattie Lee Fennell which has been filed or made in said cause and entered in the records of said court up to the 12th day of August, 1897, with his official certificate and seal of office attached thereto.

S. M. STEWART,
Probate Judge.

Sworn to and subscribed before me this 9th day of October, 1897.
[SEAL.] ED. E. GREENLEAF,
U. S. Commissioner.

EXHIBIT "A" TO ANSWER TO WRIT OF CERTIORARI.

HUNTSVILLE, ALA., *Sept. 7th*, 1897.

Messrs. D. D. Shelby and R. W. Walker.

GENTLEMEN: I was no little surprised when I found your letter of the 6th inst. returning to me the copy of the proceedings duly certified in the Fennell will case. I regret very much that this letter con-

tains suggestions which are entirely gratuitous, being unwarranted by the facts, and especially do I regret this because a petition for removal has been filed in the Federal court claiming that justice cannot be obtained in this court.

I recognize the fact that it is my sworn duty to present at any time called on a true and correct copy of all proceedings in this court. This I have done in the Fennell will case. The entry of April 15th, 1897, referred to by you was written and entered by me during the term of the court at which the case was tried and not as you so unjustly insinuate. The order of date August 4th, 1897, was made on the day it bears date, and the minute entry on this order was duly entered of record during regular run of business of that term at which the order was made.

37 It will give me pleasure to furnish you a true and correct copy of all proceedings, but I cannot insert papers which do not belong to the record, and omit entries which are a part of the record.

Now, gentlemen, this method of communicating with me regarding matter coming within the scope of my duties as judge I respectfully suggest is irregular, and I would prefer in future that you adopt the usual and proper method and which is not understood by any member of the bar of this court better than yourselves.

Yours most respectfully, S. M. STEWART,
Probate Judge.

38 *Transcript of Proceedings in Probate Court of Madison County, Alabama.*

THE STATE OF ALABAMA, }
Madison County. }

To the Honorable S. M. Stewart, judge of probate of said county:

The petitition of the undersigned, Walter E. Jordan, respectfully represents—

That Mattie Lee Fennell, who was at the time of her death an inhabitant of said county, died on or about the 5th day of February, 1897, leaving real and personal property in said county and State, having first made, on the 17th day of December, 1895, her last will and testament, she then being over 21 years old, duly signed and published by her, said Mattie Lee Fennell, and attested by Louis J. Searey and S. S. Pleasants. A copy of said will is made Exhibit "A" to this petition.

The original will is hereby surrendered to this court. Said testatrix was unmarried. She has no de-cendants; her mother and father both died before her death. Her sister, Ada F. McDonnell, a resident of said county and State, is her next of kin, and would have been her only heir had she died intestate.

Llewellyn Jordan, a resident and citizen of the State of Mississippi, temporarily residing at Washington, D. C., is named as devisee in said will. Said attesting witnesses reside at Huntsville, Alabama. Petitioner is named in said will as one of the executors thereof.

Said Llewellyn Jordan is named as executor. Also petitioner prays that a day may be set for the hearing of this petition, and that due notice thereof be given, as required by law, to the next of kin of said deceased, and that all necessary decrees, orders, and other proceedings may be had and made in the premises as may be necessary to effect the due probate of said will according to law.

W. E. JORDAN.

D. D. SHELBY,
Attorney for Petitioner.

Sworn to and subscribed by the said Walter E. Jordan before me this February 9th, 1897.

S. M. STEWART,
Judge of Probate.

39 Endorsed: Mattie Lee Fennell. Petition to probate will. Filed Feb'y 9th, 1897. S. M. Stewart, J. P. M. B. 21, p. 488, R. B.

Copy of Will.

I, Mattie Lee Fennell, being of sound mind, and knowing the uncertainty of this life do make this my last will and testament.

I. I give devise and bequeath all the property that I may own at my death, whether real, personal or mixed, to my mother, Mrs. M. E. Fennell, to have and to hold during her natural life, and at her death I give devise and bequeath the same to my cousin Llewellyn Jordan, of Washington, D. C., to have and to hold forever in fee-simple.

II. If my mother should die before my death, then I give devise and bequeath all of the property which I may own at my death whether real, personal or mixed to my said cousin, Llewellyn Jordan, in fee simple.

III. I hereby nominate and appoint said Llewellyn Jordan, and Walter E. Jordan executors of this my will, and direct that they be appointed to act as such without bond.

Signed, sealed and published as my last will this the 17th day of December, 1895.

(Signed) M. L. FENNEL. [SEAL.]

Signed, sealed, and published by the said Mattie Lee Fennell as her last will and testament in our presence, and we have signed the same as witnesses thereto in her presence, at her request, and in the presence of each other.

(Signed) LOUIS J. SEARCY.
S. S. PLEASANTS.

Endorsed: Copy of will, Miss Fennell. Filed in probate court Feb'y 8, 1897. S. M. Stewart, J. P. Exhibit "A" to petition of Walter E. Jordan.

40 *Notice of Day for Hearing Probate of Will.*

THE STATE OF ALABAMA, }
Madison County. }

To any sheriff of the State of Alabama.

To Mrs. Ada F. McDonnell:

You will please take notice that on the 11th day of February, 1897, a certain paper in writing, purporting to be the last will and testament of Mattie Lee Fennell, was filed in my office for probate by W. E. Jordan, and that the 24th day of February, 1897, was appointed a day for the hearing thereof; at which time you can appear and contest the same if you see proper.

Given under my hand this 11th day of February, 1897.

S. M. STEWART,
Judge of Probate.

Endorsed: State of Alabama, Madison county. Matter of application of W. E. Jordan to probate will of Mattie Lee Fennell, deceased. Notice to Ada F. McDonnell of day set for hearing. Issued 11th day of February, 1897. Executed by handing a copy of within writ to Mrs. Ada F. McDonnell Feb'y 11th, 1897. O. Fulgham, sh'ff.

Contest of Will.

In the Probate Court.

To the Hon. S. M. Stewart, judge of probate:

Comes Ada F. McDonnell, the wife of Dr. Henry McDonnell, a resident citizen of the county of Madison and State of Alabama, and represents and shows to your honor that she is the sister of Mattie Lee Fennell, deceased, who departed this life on the 5th of February, 1897; that the said Mattie Lee Fennell at the time of her death had no brother or sister except your petitioner.

She represents that she is the sole heir and distributee of the said Mattie Lee Fennell. She further represents that she has been informed and so believes that a certain instrument in writing, dated the 17th day of December, 1895, signed M. L. Fennell and witnessed by Louis J. Searcy and S. S. Pleasants, purporting to be the last true will and testament of the said Mattie Lee Fennell, has
41 been filed in this honorable court, praying an order of court to admit said paper-writing to probate as the last true will and testament of the said Mattie Lee Fennell.

She now here enters this her objection and contest of said writing, purporting to be the will of the said Mattie Lee Fennell, and for grounds of contest alleges and says:

1. Because the instrument purporting to be the will of the said Mattie Lee Fennell was not signed by the subscribing witnesses in the presence of the testatrix.

2. Because the said Mattie Lee Fennell did not sign her name to said paper-writing in the presence of the subscribing witness-.

3. Because the alleged will was not signed by the subscribing witnesses at the request of the testatrix, and the subscribing witnesses did not sign the same in the presence of each other and in the presence of the said Mattie Lee Fennell.

4. Because the said Mattie Lee Fennell, at the time the alleged will was signed and executed, was of unsound mind and memory and not mentally capable of making a will.

5. Because the execution of the will was procured by fraud and undue influence exercised by one Llewellyn Jordan, who is named as the sole devisee in said will, and others operating in his behalf and by his procurement.

The defendant, Ada F. McDonnell, demands a trial by jury.

WILLIAM RICHARDSON,
Attorney for Ada F. McDonnell.

Endorsed: Mattie Lee Fennell. Contest of will by Ada F. McDonnell. Jury demanded by defendant. Filed in probate court this 11th day of Feb'y, 1897. S. M. Stewart, J. P. M. B. 24, p. 490, R. B.

Amended Grounds for Contest.

In the Probate Court.

In the Matter of the Contest of the Will of MATTIE LEE FENNELL, Deceased.

Comes Ada F. McDonnell, contestant, and, by leave of the court first had and obtained, moves the court to allow her to amend the grounds of her contest, in this:

42 6. That said paper propounded is not the last will and testament of the said Mattie Lee Fennell. Said instrument is not her will.

WILLIAM RICHARDSON,
Attorney for Ada F. McDonnell.

Endorsed: Contest will, Mattie Lee Fennell. Amended grounds of contest. Filed March 22nd, 1897. S. M. Stewart, J. P.

Order Setting for Hearing.

Probate Court, Feb'y 24th, 1897.

Estate of MATTIE LEE FENNELL, Dec'd. Matter Probate Will Continued.

This day having been regularly appointed for hearing the application of W. E. Jordan, proponent, and also to consider in connection therewith the grounds of contest presented by next of kin, Mrs. Ada F. McDonnell—Wm. Richardson, Esq., for defendant, and D. D. Shelby and R. W. Walker, for the plaintiff—all being now in court, and the fact of attorney for Mrs. McDonnell having filed on the

23rd February in this court interrogatories to Columbus Few, Mary Ripley, and Henrietta Sims, all of whom reside in the city of Hendersonville, North Carolina, more than one hundred miles from the city of Huntsville, Alabama, all of whom are claimed to be material witnesses for the contestant in the matter of the contest of the probating of the will of the said Mattie Lee Fennell, deceased, and for reasons satisfactory to the court, the hearing of this matter is hereby continued to the 30th day of March, 1897, and the jury ordered to be drawn on the 20th day of March, 1897, from the box, as in the circuit court.

Proceedings at Drawing of Jury.

In Probate Court, March 20th, 1897.

Estate of MATTIE LEE FENNELL, Dec'd. Matter of Probate of Will Contest.

This being the day heretofore appointed, by order of this court entered February 24th, to draw in open court from the jury-box the names of fifteen persons from which to select jury to be empanelled for the purpose of determining whether or not to probate the will of Mattie Lee Fennell, propounded by W. E. Jordan and contested by Ada F. McDonnell—W. E. Jordan and Attor-
43 neys D. D. Shelby and R. W. Walker, for proponent, and Hon. Tancred Betts represents Wm. Richardson, for contestant—the court proceeded to draw from jury-box the following names:

J. B. Joplin, Gurley.
W. F. Lawler, Gurley.
J. S. Wilson, Whitesburgh.
Geo. Johnson (farmer), Monrovia.
L. H. Carter, Hazel Green.
Branch Fletcher (farmer), Madison.
A. J. Hannah (farmer), Gurley.
J. A. Beasley, Monrovia.
J. C. Nyman, Hurricane.
John Lawler, Maysville.
W. L. Fanning, New Market.
R. A. Givens, Gurley.
J. W. Atchley (farmer), Gurley.
S. H. Floyd, Madison.
B. T. Reagan, Maysville.

The above venire for special jury in matter of contest of will, Mattie Lee Fennell, dec'd, given to sheriff, with instructions to summon above named to appear before this court on 30th day of March, 1897, for purpose hereinbefore stated.

Hearing on Contest of Will.

In Probate Court, March 30th, 1897.

Estate of MATTIE LEE FENNELL, Dec'd. Contest of Will.

This being the day regularly appointed by order of this court, entered on February 24th, 1897, to hear matter of contest of will of Mattie Lee Fennell, deceased, and by order of same date the court proceeded, on 20th day of February, to draw from box 15 names as jurors, from which jury was to be empanelled to try issues in matter of contest of said will.

The challenges and other legal cause the jury being incomplete, court proceeded to draw from box names of eight persons from which jury list will be completed. The following names were drawn in open court:

L. H. Sanderson, farmer, Cluttsville.	Samuel Keel, farmer, Poplar Ridge.
W. T. Campbell, Gurley.	B. L. Coyle, Deposit.
James Meeks, Maysville.	J. C. Broyles, Maysville.
John T. Timmons, Whitesburgh.	C. B. Colburn, farmer, Vienna.

The above venire for special term given to sheriff with orders to serve at once and have persons in court tomorrow, April 1st, at 2 p. m., to which hour court adjourned.

41 In Probate Court, April 1st, 1897, 2 p. m.

The following persons were legally questioned, sworn, and empanelled a jury to try the issues made up in the matter of contest of will of Mattie Lee Fennell, deceased; W. E. Jordan, proponent, and Ada F. McDonnell, contestant; D. D. Shelby and R. W. Walker representing proponent and William Richardson for contestant:

Jury.

J. B. Joplin,	J. S. Wilson,	John B. Lawler,	George Johnson,
J. C. Nyman,	W. L. Fenning,	L. H. Carter,	R. A. Givens,
J. W. Atchley,	B. T. Reagan,	Wm. Campbell,	Samuel Keel.

Report of Jury.

In Probate Court, April 15th, 1897.

Estate of MATTIE LEE FENNELL, Dec'd. Matter of Contest of Will.

This day comes into court the jury heretofore empanelled on the 30th day of March, before whom the issues — made up and tried in the matter of the contest of the will of Mattie Lee Fennell, deceased (propounded by W. E. Jordan, proponent, and Ada F. McDonnell, contestant), and in open court state that they cannot agree upon a verdict, and that it is useless to detain them longer, the jury being eight in favor of proponent and four for contestant.

The jury is therefore now, by order of this court, discharged and cause continued for rehearing Monday, 6th day of June, 1897.

Continuance until July 6th, 1897.

In Probate Court, June 6th, 1897.

Estate of MATTIE LEE FENNELL, Deceased. Matter of Contest of Will.

This being the day heretofore by order of this court set for rehearing case in matter of contest of will of said deceased, now, for good reasons satisfactory to the court, said cause is continued to 6th day of July, 1897.

Amendment to Petition of Proponent.

In the Probate Court of Madison County, Alabama.

In the Matter of the Application to Probate the Will of
45 MATTIE LEE FENNELL, Deceased, by Walter E. Jordan, Proponent; Ada F. McDonnell, Contestant.

By leave of the court the proponent amends the petition by alleging the following:

"That the said Llewellyn Jordan is the sole legatee and devisee under said will, and is the person really interested in defending the validity of said will and in answering and defending the contest filed in said court to an-ul and make invalid said will."

The prayer of said petition is amended by adding the following:

"Petitioner prays that citation and all proper notice be given the said Llewellyn Jordan of this case and contest, and that he be made a party defendant to this petition.

W. E. JORDAN, *Proponent.*

Sworn to and subscribed before me this 28 day of May, 1897.

S. M. STEWART,
Judge of Probate.

Endorsed: Petition of probate of will of Mattie Lee Fennell, deceased. Proponent's amendment to petition to probate will. Filed May 28th, 1897. S. M. Stewart, judge of probate.

Order Denying Petition to Amend.

In Probate Court, August 3rd, 1897.

Matter of Petition to Amend. MATTIE LEE FENNELL, Deceased.

In the matter of the petition of W. E. Jordan to make Llewellyn Jordan party defendant to this case, and that citation and all proper notice be given said Llewellyn Jordan as such, heretofore filed with the papers in this case, May 28th, 1897, was set for hearing this August 3rd, 1897.

This day argued by Shelby and Walker for proponent and Richardson and Cooper for contestant. Motion overruled and amendment not allowed, and for reason good and satisfactory to this court the further hearing of this contest continued to Sept. 3rd, 1897.

46 *Answer of Llewellyn Jordan.*

STATE OF ALABAMA, }
Madison County. }

In Probate Court of said County.

In the matter of the contest of the probate of the will of Mattie Lee Fennell comes Llewellyn Jordan, named in the amendment to the petition in this cause filed by Walter E. Jordan, and intervenes

in said proceeding and files this his answer to the contest of Ada F. McDonnell.

Respondent for answer to the contest filed by said Ada F. McDonnell on the 11th day of February, 1897, says that the 1st, 2nd, 3rd, 4th, and 5th grounds are untrue and are denied, and for answer to the additional grounds filed March 2nd, 1897, says that the 6th grounds thereof are wholly untrue and are denied. (The seventh ground has been stricken out; is therefore not answered.)

Respondent avers that the said Mattie Lee Fennell was of sound mind and disposing memory, and that the averments in the said contest to the contrary are untrue and are denied, and that proof thereof is demanded and required.

The allegations of the said contestant that said will was obtained and procured by undue influence and fraud are denied and proof thereof required.

Respondent refers to said original will of Mattie Lee Fennell on file in said court and in said cause as a part hereof, and files herewith the affidavit of S. S. Pleasants, the surviving witness to said will.

Respondent alleges that the said Mattie Lee Fennell was at the time of her death an inhabitant of Madison county, over twenty-one years of age, and that she died on the 5th day of February, 1897, owning real and personal property in said county, having first made said last will on the 18th day of December, 1895. Ada F. McDonnell is her next of kin and only heir had she died intestate. Mattie Lee Fennell was unmarried. Said Ada F. McDonnell is a resident and citizen of Madison county.

April 4th, 1897.

LLEWELLYN JORDAN,
Devisee and Contestee.

17 *Proof of Will.*

THE STATE OF ALABAMA, }
Madison County. }

Probate Court, August 3rd, 1897.

In the Matter of the Probate of the Will of MATTIE LEE FENNELL, Deceased.

Before me, S. M. Stewart, judge of probate in and for said county, personally appeared in open court S. S. Pleasants, who lives in said county and who is known to me, who, having been by me first duly sworn and examined, did and do depose and say on oath that he is a subscribing witness to the instrument of writing now shown to him and which purports to be the last will and testament of Mattie Lee Fennell, deceased, late an inhabitant of this county, and that said Mattie Lee Fennell, since deceased, signed and executed said instrument on the date the same bears date, and declared the same to be her last will and testament, and that affiant set his signature thereto on the day the same bears date as a subscribing witness to

the same in the presence of said Mattie Lee Fennell and the other subscribing witness, Louis J. Searcy, and that such other witness subscribed his name as a witness in his presence and in the presence of the said Mattie Lee Fennell and in the presence of affiant. The said Mattie Lee Fennell was of sound mind and disposing memory, and in the opinion of the deponent fully capable of making her will at the time the same was so made, as aforesaid. Affiant further states that said Mattie Lee Fennell was on the day of the date of said will of the full age of twenty-one years *of age* and upwards, and at her death owned property in said county. Louis J. Searcy is dead.

S. S. PLEASANTS.

Sworn to and subscribed to before me this 4th day of August, 1897.

S. M. STEWART,
Judge of Probate.

Endorsed: Proof of will. Filed August 4th, 1897. S. M. Stewart, judge of probate.

48 *Order to Strike Intervention of Llewellyn Jordan from Files.*

Estate of MATTIE LEE FENNELL, Deceased.

July Term, 1897.

In this cause a paper, purporting to be an intervention on behalf of Llewellyn Jordan, having been endorsed "filed" by the clerk of this court, without the knowledge of the court, and said paper being so endorsed filed without an order authorizing said Llewellyn Jordan to intervene herein, and the motion made by Walter E. Jordan, the proponent, praying that said Llewellyn Jordan be made a party defendant hereto, on the 3rd day of August, 1897, being overruled and disallowed, it is therefore ordered that said paper purporting to be an intervention of said Llewellyn Jordan be stricken from the files in this cause.

Petition of W. E. Jordan Renouncing Right as Executor.

STATE OF ALABAMA, }
Madison County. }

In the Probate Court.

In the Matter of the Estate of MATTIE LEE FENNELL.

To the judge of said court:

The undersigned, Walter E. Jordan, named in the will of Mattie Lee Fennell as one of her executors, renounces his right to have letters testamentary issued to him. He desires that the said will shall be probated, but that letters testamentary should issue alone to the co-executor named in said will, Llewellyn Jordan.

August 5th, 1897.

WALTER E. JORDAN.

Endorsed: Estate of Mattie Lee Fennell, deceased. Filed Aug. 11, 1897. S. M. Stewart, J. P.

Petition for Special Letters of Administration.

STATE OF ALABAMA, }
Madison County. }

To Hon. S. M. Stewart, judge of probate:

Your petitioner, Ada F. McDonnell, respectfully represents to your honor that her sister, Mattie Lee Fennell, departed this life on or about the 5th of February, 1897; that at the time of her death she was a resident citizen of the county of Madison, State of Alabama; that she died seized of personal property and real estate situate and being in the county of Madison; that she left a will, the validity of which is being contested in this court; that the
49 collection of rents on decedent's plantation and other matters pertaining to the interest of her estate require the appointment of a special administrator until letters testamentary or administration have been duly issued.

Petitioner represents and shows to your honor that she is the nearest of kin to Mattie Lee Fennell, deceased. She therefore prays that your honor will issue to her special letters of administration on the estate of the said Mattie Lee Fennell, deceased, as the law in such cases directs.

And she will ever pray.

ADA F. McDONNELL.

I, Henry McDonnell, consent that letters of special administration on the estate of Mattie Lee Fennell, deceased, be granted and issued to my wife, Ada F. McDonnell, the above-named petitioner.

HENRY McDONNELL.

The judge of this court having heard that a petition had been filed in the circuit court of the United States for the northern division of the northern district of Alabama for the removal of this cause, no order will be made upon the above petition.

Endorsed: Matter of estate Mattie Lee Fennell, dec'd. Petition for letters special administration. Filed Aug. 17th, 1897. S. M. Stewart, probate judge.

Certificate of Authentication.

I, S. M. Stewart, judge of the court of probate in and for said county and State, do hereby certify that the above and foregoing — pages contain a full and complete record and transcript of all the pleadings and orders in the case of the contest of the will of Mattie Lee Fennell which had been *or* filed in said cause or entered up to and on the 12th day of August, 1897.

[SEAL.] Given under my hand and seal of office this 9th day of October, 1897.

S. M. STEWART,
Judge of Probate.

Endorsed: Transcript from probate court, Madison county, in answer to certiorari. Filed in clerk's office Oct. 9th, 1897. N. W. Trimble, clerk.

50 *Motion to Remand.*

In the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

In the Matter of the Contest of the Will of MATTIE LEE FENNELL, Deceased.

Comes Ada F. McDonnell, contestant in the matter of the contest of the will of Mattie Lee Fennell, deceased, and for answer to the petition filed in this honorable court by Llewellyn Jordan asking for the removal of a certain cause originating and pending in the probate court of Madison county, Alabama, in the matter of the probate of the will of Mattie Lee Fennell, deceased, wherein Walter E. Jordan was plaintiff and Ada F. McDonnell was contestant, says:

Respondent denies that the said Llewellyn Jordan is properly and legally a defendant in any cause or proceeding in this honorable court or in the probate court of Madison county, Alabama, in the matter of the contest of the will of Mattie Lee Fennell, deceased.

Respondent denies the allegations of said petition that, from prejudice and local influence, the said Llewellyn Jordan will not be able to obtain justice in the probate court of Madison county, Alabama, or in any other State court to which the cause could be removed; but respondent here asserts that there is no prejudice and local influence in the county of Madison that would prevent the said Llewellyn Jordan from obtaining a fair and impartial trial. Respondent denies that there was any controversy or suit pending in the probate court of Madison county, Alabama, touching or concerning the contest of the will of Mattie Lee Fennell, deceased, at the time the petition for removal was filed, wherein Llewellyn Jordan was defendant. Respondent denies that the will of Mattie Lee Fennell had been duly probated under the laws of Alabama by the affidavit of S. S. Pleasants.

Respondent denies that the will of Mattie Lee Fennell was filed or probated on the probate court of Madison county, Alabama, in common form, because the statutes of Alabama authorizes no such procedure in the matter of probate of wills.

51 Respondent denies that the proceeding in the matter of the probate of the will of Mattie Lee Fennell, deceased, in the probate court of Madison county, Alabama, is a suit *inter partes.*

Respondent denies that the affidavit and petition for removal are sufficient, and respondent asks leave of court to contest the truth of said affidavit and petition in such manner as this honorable court may direct.

Respondent files herewith a full, complete, and perfect transcript of all the orders and proceedings had in the probate court of Madison county, Alabama, touching or relating to the matter of contest

of the will of Mattie Lee Fennell, deceased, which is duly and legally certified by Hon. S. M. Stewart, the judge of said court of probate, under his official seal, which is made a part of respondent's answer, and respondent now moves this honorable court to remand said cause to the probate court of Madison county, Alabama, and for cause and grounds of said motion says:

1. The probate court of Madison county, Alabama, is a court of record, and has general, original, and exclusive jurisdiction of the probate of a will.

2. Because the probate court of Madison county, prior to the filing of the petition for removal, had assumed jurisdiction of the matter of the petition to probate and the contest of the will of Mattie Lee Fennell, dec'd, and was proceeding at the time the petition was filed to hear and determine the same.

3. Because the circuit court of the United States, northern district of Alabama, northern division, has no jurisdiction under the "removal acts of Congress 1887–1888," in the matter of a proceeding to probate a will.

4. The proceeding sought to be removed from the probate court of Madison county, Alabama, is a matter of probate jurisdiction and enquiry, and is not a "suit of a civil nature at law or in equity" within the meaning of the provision of the acts of Congress 1887–'88, and cannot be removed to this honorable court.

5. Because at the time of the filing of the petition for removal in this cause there was no controversy in the probate court of Madison county, Alabama, between a citizen of the State of Alabama and a citizen of another State, which is necessary to give this court jurisdiction.

52 6. Because the petitioner, Llewellyn Jordan, at the time of the signing of the petition for removal and making the affidavit was not a defendant in any suit, proceeding, or controversy in the probate court of Madison county, Alabama, relating to the matter of the probate of the will of Mattie Lee Fennell, deceased, and this court had no jurisdiction of this cause by virtue of said petition and affidavit when the same was filed in this court.

7. Because the petition and affidavit were insufficient, in that they did not set forth the facts and reasons showing the alleged prejudice or local influence.

8. Because the proceeding or action in the probate court of Madison county, Alabama, to establish the will of Mattie Lee Fennell, deceased, is not a seperate but a single controversy, and its removal is not authorized by the acts of Congress of 1887–'88.

9. Because the application for removal of the cause was not made in time or before the trial of the cause in the State court.

10. Because said application for removal was made too late.

11. Said cause was improperly removed, and the order for said removal was without authority of law.

WILLIAM RICHARDSON,
LAWRENCE COOPER,
Att'ys for Ada F. McDonnell.

Endorsed: Motion to remand. Filed in clerk's office Oct. 14th, 1897. N. W. Trimble, clerk U. S. circuit court.

Affidavits of Sundry Persons.

Affidavit of J. Q. Jamar.

STATE OF ALABAMA, }
Madison County. }

Personally appeared before me, J. W. Pickens, N. P. and *ex off.* J. P. for said county and State, J. Q. Jamar, who, being by me duly sworn, deposes and says that he is a deputy sheriff of Madison county, Ala.; that he summoned a number of the jurors who tried the contest of the will of Mattie Lee Fennell in the probate court of Madison county; that he did not in the performance of his
53 official duty nor as an individual nor has he at any time by words, acts, or otherwise attempted to create with any one any prejudice or local influence against Llewellyn Jordan; that he has never at any time expressed his opinion about the case. Affiant says he was frequently in attendance on the trial of the Fennell will case in the probate court; that large crowds, both men and women, were present at the trial. The preference and bias of large numbers who were present at the trial was openly expressed in the presence of the court and the jury in favor of Llewellyn Jordan. The judge from the bench notified the audience when such expressions were made that they would have to cease, or otherwise people offending in such way would have to be removed from the court-room. Since the close of the trial affiant in his capacity of deputy sheriff has had occasion to go among the people a great deal and learn what public sentiment is. He knows there is no prejudice or local influence existing among the people of Madison county against Llewellyn Jordan or in favor of Mrs. Ada F. McDonnell that would prevent Llewellyn Jordan from obtaining justice and a fair trial in the probate court of Madison county, Alabama.

J. Q. JAMAR.

Sworn to and subscribed before me this 13th day of October, 1897.

J. W. PICKENS,
N. P. and ex Off. J. P.

Affidavit of Charles P. Lane.

STATE OF ALABAMA, }
Madison County. }

Personally appeared before me, Henrietta A. Matthews, a notary public in and for said county and State, C. P. Lane, who, being by me duly sworn, deposes and says that he is now and has been for several years past editor of the Huntsville Evening Tribune; that he frequently attended the trial of the contest of the will of Mattie Lee Fennell in the probate court of Madison county, Alabama, while the same was in progress; that the partiality, preference, and

sympathy of a large number who attended the trial and of the public was strongly in favor of Llewellyn Jordan. Unusua demonstrations of sympathy and bias for Llewellyn Jordan were frequently made by persons attending the trial by applause
54 in the presence of the court and jury. Affiant states that in the pursuit of his business he has an opportunity of finding out public sentiment. No prejudice or local influence exists among the people of Madison county, Alabama, against Llewellyn Jordan or in favor of Ada F. McDonnell that could or would prevent Llewellyn Jordan from obtaining justice and a fair trial in the probate court of Madison county, Alabama.

CHARLES P. LANE.

Sworn to and subscribed before me this 11th day of October, 1897.

HENRIETTA A. MATTHEWS,
Notary Public.

Affidavit of Robert L. O'Neal.

STATE OF ALABAMA, }
Madison County. }

Personally appeared before me, Henrietta A. Mathews, notary public in and for said county and State, Robert L. O'Neal, proprietor and manager of the Daily Mercury, who, by me being duly sworn, deposes and says:

That the following is a true and correct copy of a card published by S. M. Stewart, judge of probate court of Madison county, Alabama, in the Daily Mercury, Huntsville, Alabama, Sunday, April 11th, 1897:

"Must keep quiet—The ladies reminded that their comments are out of place.—While I do not want to be harsh, I feel it my official duty to say that unless the ladies in attendance at the trial now pending in the probate court reserve their comments and criticisms and preserve order in court, I much prefer that they read the evidence in the daily papers.

S. M. STEWART,
Judge of Probate."

Upon this card the following editorial comments were made in the Mercury of the same date as follows:

"In a card, which appears in another column, Judge Stewart serves notice upon the ladies that perfect order must be maintained in the court-room hereafter. That Judge Stewart is justifiable in this course goes without saying. There can be no excuse for the comments spoken within the hearing of the court and jury. Good taste forbids the outspoken comments which are daily heard in the court-room, and for the sake of the ladies in attendance
55 we trust that a further complaint will be unnecessary."

R. L. O'NEAL,
Pres't and Mgr. Mercury.

Sworn to and subscribed before me this 11th day of Oct., 1897.

HENRIETTA A. MATTHEWS,
Notary Public.

Affidavit of Henry McDonnell.

STATE OF ALABAMA, }
Madison County. }

Personally appeared before me, Henrietta A. Matthews, notary public in and for said county and State, Henry McDonnell, who, by me being duly sworn, deposes and says that he is the husband of Ada F. McDonnell, the complainant in the matter of the will of Mattie Lee Fennell, deceased; he is a practicing physician in said county; that the only near relative he has residing in Madison county, Alabama, is his brother, Archie McDonnell, who is a farmer and lives on his plantation five miles southwest of Huntsville. Affiant states that he has no neices, nephews, or cousins residing in Madison county, Alabama; that the wife of R. E. Pettus is a second cousin of his, who resides in Madison county; that she is the only blood relative except his brother Archie that he has in this county. Affiant nor his brother have at any time exerted any influence to create a prejudice against Llewellyn Jordan. No relative of affiants have attempted to create such prejudice. Affiant further states that no prejudice or local influence exists in Madison county against Llewellyn Jordan and in favor of his wife that would prevent Llewellyn Jordan from getting justice and a fair trial in the probate court of Madison county, Alabama.

HENRY McDONNELL.

Sworn to and subscribed before me this 11th day of October, 1897.

HENRIETTA A. MATTHEWS,
Notary Public.

Affidavit of J. M. Massingale.

STATE OF ALABAMA, }
Madison County. }

Personally appeared before me, Henrietta A. Mathews, a notary public in and for said county and State, J. M. Massengale, who, being by me duly sworn, deposes and says that he is deputy sheriff
56 of Madison county; that he summoned a number of the jurors who tried the contest of the will of Mattie Lee Fennell in the probate court of Madison county, Alabama; that he did not then, by words or acts or otherwise, attempt to create with any one any prejudice or local influence against Llewellyn Jordan; that he has not at any time sought to create such prejudice or local influence; that he was frequently in attendance on the trial of the Fennell will case in the probate court; that a great many people attended said trial—both men and women; that he states that three-fourths of

the people in attendance were strongly biased and prejudiced in favor of Llewellyn Jordan; that the preferences and partialities of those attending the trial were expressed by applause and otherwise. Affiant states that he had occasion as deputy sheriff to mingle freely with the people of Madison county; he knows that no prejudice or local influence exists among the people of Madison county against Llewellyn Jordan or in favor of Mrs. Ada F. McDonnell that would prevent Llewellyn Jordan from obtaining justice and a fair trial in the probate court of Madison county, Alabama. Affiant was placed in charge of the jury when they retired to consider of their verdict, and he never expressed an opinion to any one about the case.

J. M. MASSINGALE.

Sworn to and subscribed before me this the 9th day of October, 1897.

HENRIETTA A. MATHEWS,
Notary Public.

Affidavit of Daniel Coleman.

STATE OF ALABAMA, }
Madison County. }

Personally appeared before me, N. P. and *ex off.* J. P. for said county and State, Daniel Coleman, who, being by me first duly sworn, deposes and says that he was present frequently during the session of the probate court of Madison county, Alabama, when the trial of the contest of the will of Mattie Lee Fennell, deceased, was in process. The sympathies and partialities of the public were strongly expressed in behalf of Llewellyn Jordan, the person to whom Miss Fennell left her property. During the trial a large number of people demonstrated their partiality and preferences for Llewellyn Jordan by applause and otherwise in the presence of the court and
57 jury. Affiant states that no prejudice or local influence exists among the people of Madison county against Llewellyn Jordan or in favor of Mrs. Ada F. McDonnell that would prevent Llewellyn Jordan from obtaining justice in the probate court of Madison county.

DANIEL COLEMAN.

Sworn to and subscribed before me this 9th day of October, 1897.

J. W. PICKENS,
N. P. and ex Off. J. P.

Affidavit of J. P. Powell.

STATE OF ALABAMA, }
Madison County. }

Personally appeared before me, J. W. Pickens, N. P. and *ex off.* J. P. in and for said county and State, J. P. Powell, who, being by me duly sworn, deposes and says that he was present frequently during the session of the probate court of Madison county, Alabama, when the trial of the contest of the will of Mattie Lee Fennell, de-

ceased, was in progress; that the sympathies and partiality of the public were strongly expressed in behalf of Llewellyn Jordan, the person to whom Miss Fennell left her property. During the trial a large number of people demonstrated their partiality and preferences for Llewellyn Jordan by applause and otherwise in the presence of the court and jury. Affiant states that no prejudice or local influence exists among the people of Madison county against Llewellyn Jordan or in favor of Ada F. McDonnell that would prevent Llewellyn Jordan from obtaining justice in the probate court of Madison county.

J. P. POWELL.

Sworn to and subscribed before me this 9th day of October, 1897.

J. W. PICKENS,
N. P. and ex Off. J. P.

Affidavit of A. S. Fletcher.

STATE OF ALABAMA, }
Madison County. }

Personally appeared before me, Henrietta A. Mathews, notary public in and for said county and State, A. S. Fletcher, who, being by me duly sworn, deposes and says thet he was present frequently during the session of the probate court of Madison county,
58 Alabama, when the trial of the contest of the will of Mattie Lee Fennell was in progress; that the sympathies and partiality of the public were strongly expressed in behalf of Llewellyn Jordan, the person to whom Miss Fennell left her property. During the trial a large number of persons demonstrated their partiality and preferences for Llewellyn Jordan by applause and otherwise in the presence of the court and jury. Affiant states that no prejudice or local influence exists among the people of Madison county against Llewellyn Jordan or in favor of Mrs. Ada F. McDonnell that would prevent Llewellyn Jordan from obtaining justice in the probate court of Madison county, Alabama.

A. S. FLETCHER.

Sworn to and subscribed before me this the 8th day of October, 1897.

HENRIETTA A. MATHEWS,
Notary Public.

Affidavit of Luke Matthews.

STATE OF ALABAMA, }
Madison County. }

Personally appeared before me, Henrietta A. Matthews, a notary public in and for said county and State, Luke Matthews, who, being by me duly sworn, deposes and says that he was present frequently during the session of the probate court of Madison county, Alabama, when the trial of the contest of the will of Mattie Lee Fennell, de-

ceased, was in procress; that the sympathies and partialities of the public were strongly expressed in behalf of Llewellyn Jordan, the person to whom Miss Fennell left her property. During the trial a large number of people demonstrated their partiality and preference for Llewellyn Jordan by applause and otherwise in the presence of the court and jury. Affiant states that no preference or local influence exists among the people of Madison county against Llewellyn Jordan or in favor of Mrs. Ada F. McDonnell that would prevent Llewellyn Jordan from obtaining justice in the probate court of Madison county.

LUKE MATTHEWS.

Sworn to and subscribed before me this 8th day of October, 1897.
HENRIETTA A. MATTHEWS,
Notary Public.

59 *Affidavit of W. W. Garth.*

STATE OF ALABAMA, }
Madison County. }

Personally appeared before me, Henrietta A. Matthews, a notary public in and for said State and county, W. F. Garth, who, being by me duly sworn, deposes and says that he was present during the session of the probate court of Madison county, Alabama, when the trial of the contest of the will of Mattie Lee Fennell was in progress; that the sympathies and partiality of the public were strongly expressed in behalf of Llewellyn Jordan, the person to whom Miss Fennell left her property. During the trial a large number of people demonstrated their partiality and preferences for Llewellyn Jordan by applause and otherwise in the presence of the court and jury. Affiant states that no prejudice or local influence exists among the people of Madison county against Llewellyn Jordan or in favor of Mrs. Ada F. McDonnell that would prevent Llewellyn Jordan from obtaining justice in the probate court of Madison county, Alabama.

W. F. GARTH.

Sworn to and subscribed before me this 8th day of October, 1897.
HENRIETTA A. MATTHEWS,
Notary Public.

Endorsed: Affidavits. Filed in clerk's office October 14th, 1897. N. W. Trimble, clerk U. S. courts.

Hearing on Motion to Strike from Files and to Remand.

ADA F. McDONNELL, Contestant,
vs.
LLEWELLYN JORDAN, Contestee. } No. 1652. Law.

This cause now coming on to be heard upon the motion to strike from the files and upon the motion to remand, the said motions were argued by counsel. During the argument the usual hour of

adjournment having arrived, the further hearing of this cause was continued until tomorrow morning at ten o'clock.

Tuesday, October 12th, 1897.

NOTE.—The hearing on the motions to strike from the files and to remand was duly resumed and duly continued from day to day until Thursday, the 14th day of October, on which date the argument was closed, and the court announced that decision would be reserved until a later day of the term.

60 In the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

ADA F. McDONNELL, Contestant,
vs.
LLEWELLYN JORDAN, Contestee. } No. 1652. Law. Decree on Petition to Remand.

This cause coming on to be heard on the motion to "strike this cause from the files," and also on the "motion to remand the said cause to the State court," on the grounds stated in said motions, and the said motions being heard together by agreement of counsel, and being argued in court orally by counsel, and being duly considered by the court, it is now—

Ordered, adjudged, and decreed by the court that the said "motion to strike from the files" and the said "motion to remand" are both overruled and disallowed, and this court retains jurisdiction of the said cause.

October 18th, 1897.

JOHN BRUCE, *Judge.*

Filed in open court October 19th, 1897.

N. W. TRIMBLE, *Clerk.*

61 *Certificate to Supreme Court.*

In the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

ADA F. McDONNELL, Contestant,
vs.
LLEWELLYN JORDAN, Contestee. } No. 1652. Law.

In this cause Ada F. McDonnell, named as contestant herein having prayed for and this day obtained a writ of error from the judgment of this court, rendered on the 19th day of October, 1897, returnable to the present term of the Supreme Court of the United States, under the provisions of sec. 5 of the act of Congress approved March 3rd, 1891, entitled "An act to establish circuit courts of appeals, and to define and regulate in certain causes the jurisdiction of the courts of the United States, and for other purposes," this court now certifies to the Supreme Court the following questions of jurisdiction:

1. Whether this court has jurisdiction to hear and determine the

matters of controversy shown in the record between said Llewellyn Jordan and Ada F. McDonnell.

2. Whether this court has jurisdiction to hear and determine a cause removed to this court from the State court wherein it is sought to establish and probate the will of Mattie Lee Fennell, deceased, late a resident citizen of the State of Alabama, Madison county.

3. Whether this court has jurisdiction to remove the proceeding shown in the record from the State probate court upon the petition of the said Llewellyn Jordan.

4. Whether this court acquired jurisdiction of the matters in controversy between said Llewellyn Jordan and Ada F. McDonnell upon the petition of the said Llewellyn Jordan to remove the said proceedings from the State probate court to this court.

5. Whether the said Llewellyn Jordan by his proceeding of intervention in the State probate court became a party to said cause, entitling him to remove said cause from the State probate court to this court.

6. Whether the said Llewellyn Jordan by his proceedings of intervention became a party defendant to said cause, enabling
62 him to remove from said court to this court the said proceedings therein commenced by W. E. Jordan, as one of the executors of the instrument purporting to be the last will and testament of Mattie Lee Fennell, deceased, as shown by the record.

October 28th, 1897.

JOHN BRUCE, *Judge.*

Endorsed: Filed October 30th, 1897.

Mandate from Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable the judges of the circuit court of the United States for the northern district of Alabama, Greeting:

Whereas lately, in the circuit court of the United States for the northern district of Alabama, before you or some of you, in a cause between Ada F. McDonnell, contestant, and Llewellyn Jordan, contestee, wherein the judgment of the said circuit court, entered in the said cause on the 18th day of October, 1897, was in favor of the said contestee, Llewellyn Jordan, and against said contestane, as by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States by virtue of a crit of error, agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and ninety-seven, the said cause came on to be heard before the said Supreme Court on the said transcript of record and on a motion to dismiss, which was argued by counsel:

On consideration whereof it is now here ordered and adjudged by

this court that the writ of error in this cause be, and the same is hereby, dismissed for the want of jurisdiction.

JANUARY 10TH, 1898.

You, therefore, are hereby commanded that such proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding.

63 Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the tenth day of February, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Endorsed: Filed February 14th, 1898. N. W. Trimble, clerk U. S. court.

64 *Motion to Strike from Files.*

In the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

In re Estate of MATTIE LEE FENNELL, Deceased.

Comes Ada F. McDonnell, by her attorneys, and not wa-ving any right hereafter to make and enter a motion to remand, and whose appearance is expressly limited to the purpose of this motion and who is the contestant in a certain proceeding instituted in the probate court of Madison county, Alabama, to probate a certain instrument in writing dated Sept. 17th, 1895, and purporting to be the last will and testament of Mattie Lee Fennell, deceased, and moves this court to dismiss and strike from the file in this cause the petition of Llewellyn Jordan for the reasons particularly set forth in the motion to dismiss and strike from the files said petition in this cause; which said motion was filed in this court on the 3rd day of September, 1897.

WILLIAM RICHARDSON,
LAWRENCE COOPER,
Attorneys for Ada F. McDonnell.

Endorsed: Filed in open court October 31st, 1898. N. W. Trimble, clerk U. S. circuit court.

Motion to Remand.

In the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

In re Estate of MATTIE LEE FENNELL, Deceased.

Comes Ada F. McDonnell, by her attorneys, and moves the court to remand this cause to the State court of probate for the county of Madison, State of Alabama, for the reasons and matters set forth

particularly in the motion to remand filed herein by the said Ada F. McDonnell on the 14th day of October, 1897.

WILLIAM RICHARDSON,
LAWRENCE COOPER,
Attorneys for Ada F. McDonnell.

Endorsed: Filed in open court October 31st, 1898. N. W. Trimble, clerk U. S. circuit court.

65 *Motion to Strike "Motion to Strike from Files the Petition of Llewellyn Jordan" and "Motion to Remand" from Files.*

In the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

ADA F. MCDONNELL, Contestant,
vs.
LLEWELLYN JORDAN, Contestee. } No. 1652. Law.

The above-named contestant, Llewellyn Jordan, moves the court to strike from the file in this cause the motions of the contestant filed October 31st, 1898, to remand the cause, and to strike from the file the petition of contestee, on the grounds:

1st. That the matter of said motion has been disposed of by the ruling of the court at a former term in this cause.

2nd. That a writ of error to the Supreme Court of the United States to review said ruling of this court in this cause has been sued out by said contestant, and said writ of error has been disposed of by said Supreme Court.

3rd. Because said motion has been unreasonably delayed, and the trial of the cause should not now be obstructed by its consideration.

D. D. SHELBY,
R. W. WALKER,
Attorneys for Contestee.

Endorsed: Filed in open court October 31st, 1898. N. W. Trimble, clerk U. S. circuit court.

Order Sustaining Motion of Contestee.

ADA F. MCDONNELL, Contestant,
vs.
LLEWELLYN JORDAN, Contestee. } No. 1652. Law.

This cause coming on to be heard, comes the contestant, by counsel, and files two motions—one, to strike the petition of the contestee from the files, and the other to remand the cause. Thereupon the contestee, by counsel, comes and files his motion to strike the two motions of the contestant from the files. The court heard the counsel briefly on the motions, and, upon consideration, held that, the matter having been determined at a previous term of the court,

— decided not to pass upon it again. Thereupon the court
66 sustained the motion of the contestee to strike the said two motions of the contestant from the files; to which decision of the court the contestant in open court duly excepted.

In open court, October 31st, 1898.

Motion of Contestant for Continuance Denied.

ADA F. McDONNELL, Contestant,
vs.
LLEWELLYN JORDAN, Contestee. } No. 1652. Law.

Comes the contestant, by counsel, and moves the court for a continuance of this cause, alleging the absence of an important witness. The said motion, being resisted by counsel for contestee, upon consideration by the court, was overruled and denied.

Organization of Jury.

ADA F. McDONNELL, Contestant,
vs.
LLEWELLYN JORDAN, Contestee. } No. 1652. Law.

This cause now coming on to be heard, come the parties, by attorneys, and, on the motion of the counsel for contestant, it is ordered that a "struck" jury be empanelled for the trial of this cause; and thereupon the following-named persons were duly selected, empanelled, tried, sworn as such "struck" jury, to wit:

Ed. Christiansen,	Thomas Pippin,	Madison Nichols,	Thomas J. Counts,
J. J. Bishop,	W. C. Bracken,	B. F. Gibson,	G. W. Ellett,
J. W. Rigsby,	W. L. Cox (c.),	A. J. Brown,	A. J. Sherill,

and the hearing of this cause was commenced.

While waiting the coming of witnesses, the hour of daily adjournment having arrived, the jury were cautioned by the court, and the further hearing of this cause was continued until tomorrow morning at ten o'clock.

Motion to Strike Intervention of Llewellyn Jordan from Files.

ADA F. McDONNELL, Contestant,
vs.
LLEWELLYN JORDAN, Contestee. } No. 1652. Law.

Comes the contestant, by counsel, and moves the court that the paper purporting to be an intervening petition on behalf of Llewellyn Jordan be struck from the files in this cause for the following reasons:

1. Because said paper was not filed in the probate court of Madison county, Alabama.

67 2. Because there is no law authorizing intervening petitions in the contest of a will.

3. Because said transcript filed in this cause showed that said intervention was not filed in said court of probate.

The said motion, being duly considered by the court, was overruled and denied; to which ruling the contestant duly excepted.

In open court, November 1st, 1898.

NOTE.—The hearing of this cause was regularly and duly adjourned from day to day until November 8th, 1898, on which day the verdict of the jury was returned.

Verdict of the Jury.

ADA F. McDONNELL, Contestant,
vs.
LLEWELLYN JORDAN, Contestee. } No. 1642. Law.

This being the day and the hour to which the further hearing of this cause was on yesterday continued, now come again the parties to this cause in person, and also by their counsel. Comes also again the jury heretofore duly empanelled, tried, and sworn herein, and the hearing of this cause is resumed, and at the close of the testimony in the cause the court charged the jury, directing a verdict in favor of Llewellyn Jordan, contestee. Thereupon the jury return their verdict in writing, signed by their foreman, and on their oath do say:

"We, the jury, find the issues in favor of the contestee, Llewellyn Jordan.

ED. CHRISTIANSEN, *Foreman.*"

It is therefore considered by the court that the contest of Ada F. McDonnell of the last will and testament of Mattie Lee Fennell, deceased, and the several grounds of said contest be, and the same are hereby, overruled and denied.

It is further considered and adjudged by the court that the contestee, Llewellyn Jordan, have and recover of the contestant, Ada F. McDonnell, the costs in this behalf expended, for which, if not otherwise paid, an execution may issue.

In open court, November 8th, 1898.

68 *Certificate to the Supreme Court.*

In the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

ADA F. McDONNELL, Contestant,
vs.
LLEWELLYN JORDAN, Contestee. } No. 1652. Law.

In this cause Ada F. McDonnell, named as contestant herein, having prayed for and obtained a writ of error from the final judgment of this court in this cause, rendered on the 8th day of November, 1898, returnable to the present term of the Supreme Court of the United States under the provisions of section five of the act of

Congress approved March 3rd, 1891, entitled "An act to establish circuit courts of appeal, and to define and regulate in certain causes the jurisdiction of the courts of the United States, and for other purposes," this court now certifies to the Supreme Court the following questions of jurisdiction:

1. Whether this court has jurisdiction to hear and determine the matters of controversy shown in the record between said Llewellyn Jordan and Ada F. McDonnell.

2. Whether this court has jurisdiction to hear and determine the cause removed to this court from the State court, wherein it is sought to establish and probate the will of Mattie Lee Fennell, deceased, late a resident citizen of the county of Madison, State of Alabama.

3. Whether this court has jurisdiction to remove the proceeding shown in the record from the State probate court upon the petition of the said Llewellyn Jordan.

4. Whether this court acquired jurisdiction of the matters in controversy between the said Llewellyn Jordan and Ada F. McDonnell upon the petition of the said Llewellyn Jordan to remove the said proceedings from the State probate court to this court.

5. Whether this court has jurisdiction to entertain the petition of the said Llewellyn Jordan for the removal of said proceeding to this court after the mistrial of said cause in the State probate court, as shown by the record filed herein.

69 6. Whether this court has jurisdiction to entertain the petition of said Llewellyn Jordan to remove said cause from the State probate court to this court after a jury had been empanelled in the State probate court, the trial entered upon, the failure of the jury to agree, and a mistrial of said cause entered in said probate court.

7. Whether this court has jurisdiction of the petition of said Llewellyn Jordan to remove said cause from said probate court to this court after filing in said probate court an answer to the contest of said will.

Done in open court this 8th day of November, 1898.

JOHN BRUCE, *Judge.*

The foregoing paper was actually signed by me on the 15th day of March, 1899, at Birmingham, Alabama.

JOHN BRUCE, *Judge.*

April 4, 1899.

Filed November 8th, 1898.

N. W. TRIMBLE, *Clerk.*

Petition for Writ of Error.

In the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

ADA F. McDONNELL, Contestant,
vs.
LLEWELLYN JORDAN, Contestee. } No. 1652. Law.

And now comes Ada F. McDonnell, the defendant, named as contestant herein, and says:

That on the 8th day of November, 1898, this court entered final judgment herein in favor of Llewellyn Jordan, the contestee, and against this defendant, named as contestant, in which judgment and the proceedings had thereto in this cause certain errors were committed to the prejudice of this defendant, named herein as contestant, which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this defendant, named in said proceedings as contestant, prays that a writ of error may issue in this behalf to the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

March 15th, 1889.

WILLIAM RICHARDSON,
LAWRENCE COOPER,
Attorneys for Ada F. McDonnell, Defendant and Contestant.

Filed in clerk's office March 15th, 1889.

N. W. TRIMBLE, *Clerk.*

70 *Assignment of Errors.*

In the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

ADA F. McDONNELL, Contestant,
vs.
LLEWELLYN JORDAN, Contestee. } No. 1652. Law.

The defendant, Ada F. McDonnell, named in the proceedings as contestant, in connection with her petition for a writ of error makes the following assignments of error, which she avers occurred upon the trial of the cause, to wit:

1. The court erred in refusing to grant the motion of said Ada F. McDonnell to strike from the files the petition of said Llewellyn Jordan for the removal of the contest from the probate court of the county of Madison, State of Alabama, of the instrument offered for probate as the last will and testament of Mattie Lee Fennell, deceased.

2. The court erred in refusing to strike from the files the petition of said Llewellyn Jordan for the removal of said contest of said in-

strument offered as the last will and testament of Mattie Lee Fennell, deceased, for probate in the court of probate for the county of Madison, State of Alabama, because it appears from said petition that this court is without jurisdiction to hear and determine the matter in controversy.

3. The court erred in refusing to strike from the files the petition of said Llewellyn Jordan for the removal of the contest of said instrument offered as the last will and testament of Mattie Lee Fennell, deceased, from the probate court of the county of Madison, State of Alabama, because it affirmatively appears from the record that the proceeding in said court of probate is a proceeding to establish and probate the will of said Mattie Lee Fennell, deceased.

4. The court erred in refusing to strike from the files the petition of said Llewellyn Jordan, because it appears from said record that he is not a party to said proceeding, and that this court is without jurisdiction to hear said petition and determine his alleged right to intervene therein.

5. The court erred in denying the motion to strike the
71 petition of said Llewellyn Jordan from the files, because it affirmatively appears from the authenticated record and proceedings of said court of probate filed in this court that there was not and is not any cause pending in said court of probate between said "Ada F. McDonnell, contestant, *v.* Llewellyn Jordan, contestee."

6. The court erred in denying the motion of Ada F. McDonnell to remand this cause to the State probate court.

7. The court erred in refusing to remand said cause to the State probate court.

8. The court erred in denying the motion of Ada F. McDonnell to remand this cause to the probate court of the county of Madison, State of Alabama, because this court is without jurisdiction in the premises.

9. The court erred in denying the motion of said Ada F. McDonnell to remand this cause to the probate court of the county of Madison, State of Alabama, because the said proceeding in said court of probate is a proceeding to establish the will of Mattie Lee Fennell, deceased.

10. The court erred in denying the motion of said Ada F. McDonnell to remand this cause to the probate court of the county of Madison, State of Alabama, because the said proceeding in said probate court is a proceeding to probate and establish the will of said Mattie Lee Fennell, deceased, the said court of probate having exclusive jurisdiction in the premises.

11. This court erred in denying the motion of said Ada F. McDonnell to remand this cause to the probate court of the county of Madison, State of Alabama, because the proceeding in the said court of probate is a proceeding to probate and establish the will of said Mattie Lee Fennell, over which this court has no jurisdiction.

12. The court erred in denying the motion of Ada F. McDonnell to remand this cause to the court of probate for the county of Madison, State of Alabama, because the proceeding in the said court of

probate is a proceeding to probate and establish the will of
72 Mattie Lee Fennell, while this court, in refusing to so remand this cause, takes jurisdiction in the premises, when, by law, this court and the courts of the United States have no jurisdiction in the premises.

13. The court erred in denying the motion of Ada F. McDonnell to remand this cause to the probate court of the county of Madison, State of Alabama, because it appears from the record of the proceedings therein that this court is without jurisdiction in the premises in this, that the said Llewellyn Jordan, by his intervention in said proceedings, makes himself a party defendant, when by the laws of Alabama the said Ada F. McDonnell is a defendant, and that by said petition for removal a separable controversy is not presented to this court.

14. The court erred in denying the motion of said Ada F. McDonnell to remand said cause to the probate court of the county of Madison, State of Alabama, because this court has no jurisdiction in the premises in this, that said proceeding is a proceeding to establish and probate the will of Mattie Lee Fennell, deceased, and a proceeding to establish and probate a will does not present a separable controversy between the parties.

15. The court erred in denying the motion of said Ada F. McDonnell to remand said cause to the probate court of the county of Madison, State of Alabama, because a proceeding to establish a will is not a suit of a civil nature at common law or in equity removable from the State court to the circuit court of the United States.

16. The court erred in denying the motion of Ada F. McDonnell to remand said cause to the probate court of the county of Madison, State of Alabama, because this court is without jurisdiction in the premises in this, that the petition for removal was not filed in this court within the time prescribed by law.

17. The court erred in denying the motion of Ada F. McDonnell to remand said cause to the probate court of the county of Madison, State of Alabama, because this court is without jurisdiction in the premises in this, that the petition for removal was not filed before or at the term at which the cause could have been first tried and before the trial thereof.

73 18. The court erred in its judgment of October 17th, 1897, denying the motion of the said Ada F. McDonnell to strike this cause from the files and overruling the motion to remand said cause to the State probate court.

19. The court erred in its judgment of October 31st, 1898, denying the motion of the said Ada F. McDonnell to remand said cause to the State court.

20. The court erred in its judgment of October 31st, 1898, sustaining the motion of the said Llewellyn Jordan to strike from the files the motion so made by the said Ada F. McDonnell to strike the petition of the said Llewellyn Jordan from the files and the motion of said Ada F. McDonnell to remand said cause to the State probate court.

21. The court erred in its judgment of November 1st, 1898, refus-

ing to strike the intervening petition of Llewellyn Jordan from the files in this cause.

22. The court erred in its final judgment, rendered in this cause on the 8th day of November, 1898.

23. The court erred in its final judgment, rendered in this cause on the 8th day of November, 1898, overruling and denying the matters of contest of said Ada F. McDonnell to the last will and testament of Mattie Lee Fennell, deceased, because said court was without power and jurisdiction to hear and determine the contest of the said last will and testament.

24. The court erred in denying the motion of Ada F. McDonnell to remand said cause to the probate court of the county of Madison, State of Alabama, because the court was without jurisdiction in the premises in this, that it affirmatively appears in the record that a trial of said cause had taken place in the said probate court of Madison county, Alabama; that the jury failed to agree, a mistrial was entered and cause continued before the petition for removal from the State to the Federal court was filed.

25. The court erred in denying the motion of Ada F. McDonnell to remand said cause to the probate court of Madison county, State of Alabama, because the court was without jurisdiction in the premises in this, that Llewellyn Jordan was not a defendant in the cause when the same commenced in the probate court and was not
74 a defendant in the cause at the time of the filing of the petition and order for removal.

26. The court erred in denying the motion of Ada F. McDonnell to remand said cause to the probate court of the county of Madison, State of Alabama, because the court was without jurisdiction in this, that Llewellyn Jordan had submitted to the jurisdiction of the State court by filing an answer to the contest of Ada F. McDonnell before his petition for removal was filed.

WILLIAM RICHARDSON,
LAWRENCE COOPER,
Attorneys for Ada F. McDonnell, Contestant.

Filed March 15th, 1899.

N. W. TRIMBLE, *Clerk.*

Order Granting Writ of Error.

In the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

ADA F. MCDONNELL, Contestant,
vs.
LLEWELLYN JORDAN, Contestee. } No. 1652. Law.

This 15th day of March, 1899, comes the defendant named in the proceedings herein as contestant, by her attorneys, and filed herein and presented to the court her petition praying for the allowance of a writ of error intended to be urged by them, praying also that a transcript of the records and proceedings and papers upon which

the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the court does allow the writ of error upon the defendant named in the caption as contestant giving bond, according to law, in the sum of five hundred dollars.

JOHN BRUCE, *Judge.*

Filed March 15th, 1899.

N. W. TRIMBLE, *Clerk.*

75 The Supreme Court of the United States.

THE UNITED STATES OF AMERICA:

The President of the United States to the honorable judge of the circuit court of the United States for the northern division of the northern district of Alabama, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Ada F. McDonnell, contestant, and Llewellyn Jordan, contestee, a manifest error has happened, to the great damage of the said Ada F. McDonnell, contestant, as by her complaint appears, we, being willing that error, if any hath been made, should be duly corrected and all full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ to the present term of said court, within thirty days from the signing of this citation, to wit, the 10th day of April, 1899, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error whatever of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 15th day of March, 1899, in the 123 year of the Independence of the United States of America.

[Seal U. S. Circuit Court, N. D. of Alabama.]

N. W. TRIMBLE,
Clerk U. S. Circuit Court, Nor. Dist. Ala.

I, N. W. Trimble, clerk of the circuit court of the United States for the northern division of the northern district of Alabama, do hereby certify that the foregoing writ of error has been served upon the defendant in error, Llewellyn Jordan, by lodging a copy thereof for said defendant in error in the office of the clerk of this court.

March 16th, 1899.

[Seal U. S. Circuit Court, N. D. of Alabama.]

N. W. TRIMBLE,
Clerk U. S. Circuit Court.

[Endorsed:] Ada F. McDonnell *v.* Llewellyn Jordan. Writ of error. Filed March 15, 1899. N. W. Trimble, clerk.

76 *Appeal Bond.*

In the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

ADA F. McDONNELL, Contestant,
vs.
LLEWELLYN JORDAN, Contestee. } No. 1652. Law.

Know all men by these presents that we, Ada F. McDonnell, as principal, and Henry McDonnell and A. McDonnell, as sureties, are held and firmly bound unto Llewellyn Jordan in the full and just sum of five hundred dollars ($500.00), to be paid to the said Llewellyn Jordan, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 15th day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, at a circuit court of the United States for the northern division of the northern district of Alabama, in a suit pending in said court between Ada F. McDonnell, defendant, named herein as contestant, and Llewellyn Jordan, named herein as contestee, a final judgment was rendered against said Ada F. McDonnell, and the said Ada F. McDonnell having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment of the aforesaid suit, and a citation directed to the said Llewellyn Jordan, citing and admonishing him to appear at the present session of the Supreme Court of the United States within thirty days from the signing of the petition in said cause:

Now, the condition of the above obligation is such that if the said Ada F. McDonnell shall prosecute said writ of error to effect and answer all damages and costs if she fail to make the plea good, then the above obligation to be void; else to remain in full force and virtue.

ADA F. McDONNELL. [SEAL.]
HENRY McDONNELL. [SEAL.]
A. McDONNELL. [SEAL.]

Signed and delivered in the presence of—

——— ———.

Approved:
JOHN BRUCE, *Judge.*

Filed March 15th, 1899.

77 UNITED STATES OF AMERICA:

The President of the United States to Llewellyn Jordan, Greeting:

You are hereby cited and admonished to be and appear at the present term of the Supreme Court of the United States, to be holden at the city of Washington, on Monday, the 10th day of April, 1899, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern division of the northern district of Alabama, wherein Ada F. McDonnell is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 15th day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

JOHN BRUCE, *Judge.*

77½ [Endorsed:] Ada F. McDonnell *v.* Llewellyn Jordan. Citation. Filed March 15, 1899. N. W. Trimble, clerk.

Marshal's Return of Service.

On this 18th day of March, 1899, before me, Ed. E. Greenleaf, United States commissioner in and for the northern district of Alabama, personally appeared O. B. Harris, deputy United States marshal, and makes oath that he delivered a true copy of the within citation to R. W. Walker, Esq., attorney of record for Llewellyn Jordan, defendant in error herein.

O. B. HARRIS,
Deputy U. S. Marshal.

Sworn to and subscribed in my presence this 18th day of March, 1899.

[Seal of Ed. E. Greenleaf, U. S. Commissioner, Northern Dist. Alabama.]

ED. E. GREENLEAF,
U. S. Commissioner.

78 *Order for Final Adjournment of Court.*

It is ordered that the circuit and district courts of the United States for the northern district and northern division be, and the same are hereby, adjourned *sine die.*

JOHN BRUCE, *Judge.*

March 16th, 1899.

79 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Northern District of Alabama, Northern Division.

I, N. W. Trimble, clerk of the circuit court of the United States for the northern division of the northern district of Alabama, do hereby certify that the foregoing manuscript pages numbered from

one to seventy-seven, inclusive, contain a full, true, complete, and perfect transcript and copy of record and proceedings heretofore had and entered of record in said court in a certain cause lately pending in said court wherein Ada F. McDonnell was contestant and Llewellyn Jordan was contestee, as fully and completely as the same is of record and on file in my office.

In testimony to the above I hereunto sign my name and affix the seal of said circuit court, at Huntsville, Alabama, the place of holding said court, this the 20th day of March, A. D. 1899.

Seal U. S. Circuit Court, N. D. of Alabama.

N. W. TRIMBLE,

Clerk U. S. Circuit Court, Nor. Div., Nor. Dist. Alabama.

Endorsed on cover: File No., 17,355. N. Alabama C. C. U. S. Term No., 253. Ada F. McDonnell, plaintiff in error, *vs.* Llewellyn Jordan. Filed April 6th, 1899.

No. 253.

Brf. of Richardson & Cooper for P. in E.

Office Supreme Court U. S.
FILED
OCT 23 1899
JAMES H. McKENNEY,
Clerk

Filed Oct. 23, 1899.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

ADA F. McDONNELL, Plaintiff in Error,

No. 253. vs.

LLELLYN JORDAN, Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

BRIEF FOR PLAINTIFF IN ERROR, ON MOTION TO DISMISS, MADE BY DEFENDANT IN ERROR.

WILLIAM RICHARDSON,
LAWRENCE COOPER,
Attorneys for Plaintiff in Error.

In the Supreme Court of the United States,

OCTOBER TERM, 1899.

ADA F. McDONNELL, Plaintiff in Error,

No. 253. vs.

LLEWELLYN JORDAN, Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

Statement of Facts and Brief, on Behalf of Plaintiff in Error, in Reply to the Motion made by Defandant in Error, to Dismiss or Affirm the Writ of Error.

Matt e Lee Fennell, a resident citizen of the county of Madison, State of Alabama, died on the 5th day of February, 1897, leaving a will executed by her on December 17th, 1895, in which she devised all her property to her mother, Mrs. M. E. Fennell, during her natural lifetime, and on the death of her mother the property to go to Llewellyn Jordan. In the will, Walter E. Jordan, a resident citizen of Madison county, and Llewellyn Jordan, a resident citizen of the state of Mississippi were nominated as execu-

tors without bond. Mrs. Fennell, the original and first devisee under the will died on the————day of————, 1896. On the 9th day of February, 1897, Walter E. Jordon, one of the named executors filed his petition in the Probate Court of Mad son county, Alabama, to have the will of Mattie Lee Fennell admitted to probate. On the 11th day of February, 1897, Ada F. McDonnell, the sister and only heir at law of Mattie Lee Fennell, filed in said Probate Court her written contest of the alleged will, based on certain grounds and demanding a trial by jury.

On the first day of April, 1897, a jury was empannelled in the Probate Court to try said contest, and an issue was then made up by said Court, between Walter E. Jordan as plaintiff and Ada F McDonnell as defendant, and the trial entered upon. On the 15th day of April, 1897, after having considered the case, the jury came into Court and reported that they were unable to agree upon a verdict; thereupon the jury was discharged and the cause continued.

On the 28th day of May, 1897, Walter E. Jordan, the proponent and plaintiff in the cause in the Probate Court, filed his petition in the Probate Court, asking that Llewellyn Jordan, who was named as a co-executor, be made a party defendant in the cause then pending in the Probate Court. On the 3rd day of August, 1897, the Probate Court denied the petition or proposed amendment to make Llewellyn Jordan a defendant.

On August 4th, 1897, Llewellyn Jordan, filed in the Probate Court an answer to the contest of Ada F. McDonnell—called an intervening petition. On the 4th day of August, 1897, the Probate Court entered an order dismissing or striking from the file the answer or intervening petition of Llewellyn Jordan.

On August 5th, 1897, Walter E. Jordan, the proponent of the will, filed in the Probate Court, a renunciation of his right to have letters testamentary issued to him and asked that the same be issued to Llewellyn Jordan. On the 12th day of August, 1897, Llewelly Jordan filled his petition in the Circuit Court of the United States for the Northern Division of the Northern District of Alabama, to remove to said Federal Court the matter of the proceedings to probate and contest the will of Mattie Lee Fennell, then

pending in the Probate Court of Madison County, Alabama, on the ground that from prejudice and local influence he could not obtain justice in the Probate Court or in any other State Court. Without notice, the cause was removed by order, August 12th, 1897, from the Probate Court of Madison County, Alabama, to the United States Court for the Northern Division of the Northern District of Alabama.

Plaintiff in Error filed a motion in the United States Circuit Court for the Northern Division of the Northern District of Alabama to remand said cause to the Probate Court of Madison county, Ala.

Plaintiff in Error, also, filed in the Circuit Court, a motion to dismiss, and strike from the file, the petition of the Defendant in Error, for the removal of the probate proceeding, from the State Court, to said Circuit Court.

The trial Court maintained jurisdiction of the cause, and accordingly overruled each of said motions.

The Defendant in Error now moves this Court to dismiss the Writ of Error, or affirm the judgment of the Court below; and this motion embraces in effect two propositions:

1. That no question of jurisdiction has been certified to this Court and that this Court plainly has no jurisdiction of the cause.

2. That the questions submitted by the Plaintiff in Error, can be presented only by a Bill of Exceptions.

First. By the express terms of section 5 of the Act of March 3, 1891, writs of error may be taken from the existing circuit courts direct to the Supreme Court "in any case in which the jurisdiction of the Court is in issue." The jurisdiction of the Court is the issue presented. The trial judge held that the Circuit Court had jurisdiction of the cause, and he accordingly proceeded to have the same heard and determined. We think it very manifest that the Court had no jurisdiction of the case. The petition for removal to the Circuit Court of the United States, carries with it as an exhibit, the record of the proceedings of the State Probate Court.

The proceedings in the State Court, sought the probate of the will of Mattie Lee Fennell, deceased. The cause having been removed to the Federal Court, the purpose of the original proceedings was not changed, but remained the same,—an effort to probate the will. The Plaintiff in Error met this question at the threshold, denying that the Circuit Court had jurisdiction in the premises. The cases, hereafter cited, we submit, are in thorough accord with our view, and show very manifestly that the Circuit Court was without jurisdiction. The Act of Congress was designed to meet just such cases, and, therefore, the Writ of Error is sued out direct to this Court.

Second. The contention that the question must be presented by a Bill of Exceptions, is erroneous. The question arises upon the record, and could not be presented by a Bill of Exceptions. It is not a case, where a Court is alleged to have erred in its instructions to the jury,—no error is based upon the ruling of the Court in admitting or rejecting testimony.

The record affirmatively shows that the Circuit Court was without jurisdiction, and this being made clearly to appear, this Court will reverse, with instructions to remand the case to the State Court.

This doctrine was early announced by this Court, and has since been strictly maintained.

In Slacum v. Pomeroy, 6 Cranch, 221 (225), it was held, that it was not too late to allege as error, in this Court, a fault in the declaration, which ought to have prevented the rendition of a judgment in the Court below.

So, in Garland v. Davis, 4 Howard, 121 (143), it is said to be the duty of the Court to give judgment of the whole record, and not merely on the points stated by counsel.

To the same effect, we find in Bennett v. Butterworth, 11 Howard 669 (676) "as these errors are patent upon the record, they are open to revision here, without any motion in arrest of judgment, or exception taken in the District Court." Suydan v. Williamson, 20 Howard 427 (433), states the rule in similar language, showing that it is wholly unnecessary to present the question by Bill of Exceptions, or in any other manner, when the error is apparent in the record.

In fact, it has grown to be elementary law, that this Court, will search the record to ascertain whether it has jurisdiction, whether or not the question is presented. No consent can waive it, and no agreement can create it.

Mansfield Railway Co., vs. Swan, 111 U. S., 379, (382).
Grace vs. American Insurence Co., 109 U. S., 278, (283).
Blacklock vs. Small, 127 U. S., 96.
Cameron vs. Hodges, 127 U. S., 322.
Metcalf vs. Watertown, 128 U. S., 586.
Everhart vs. Huntsville Female College, 120 U. S., 223.
Robertson vs. Cease, 97 U. S., 646.

This Court, in Morris vs. Gilmer, 129 U. S., 315 (325), has said: "But if the record discloses a controversy of which the Court cannot properly take cognizance, its duty is to proceed no further, and dismiss the suit; and, its failure or refusal to do what, under the law applicable to the facts proved, it ought to do, is an error, which this Court, upon its own motion, will correct, when the case is brought here for review."

In said cause, it is further stated, the Statute does not prescribe any particular mode in which such fact may be brought to the attention of the Court; and whether the Circuit Court has, or has not jurisdiction is a question which this Court must examine and determine, even if the parties forbear to make it, or consent that the case be considered upon its merits.

A motion to strike from the file a demurrer in itself a part of the pleadings in the cause, constitutes a part of the record proper of the primary court, and must be brought here as a part of the transcript of that record, and not as a mere statement of the presiding Judge embodied in a bill of exceptions.

Powell vs. Henry, 96 Ala., 412.

It is a general rule of appellate procedure that a bill of exceptions is useless, and indeed none should be brought up to the Appellate Court, where all the facts constituting the alleged error appear on the face of the record proper.

3 Ency. Pl. and Pr., p. 404.

This rule applies to motions founded on facts apparent of record, as a motion in arrest of judgment.

3 Ency. Pl. and Pr., p. 408.

Baker vs. People, 105, 111., 452.

The motion to strike, and the motion to remand, is based upon matter apparent upon the record, and is scarcely different from a demurrer, upon other facts, calling in question the sufficiency of the petition.

Sivoly vs. Scott, 56 Ala., 555.

Batchelder vs. Batchelder, 2 Allen, 105.

Raymond vs. Rhodes, 135 Mass., 337.

Petty vs. Dill, 53 Ala., 641.

Exparte Knight, 61 Ala., 482.

The Alabama cases, cited by the defendant in error, refer to motions, based upon facts aliunde the record.

It would, therefore, appear quite clear that a Bill of Exceptions is not only unecessary, but that the question of jurisdiction can only be presented by the record of the proceedings.

The Defendant in Error, in argument, asserts that the certificate of jusisdictional questions was not made during the term of the Court. The record affirmatively shows that this pretension is not true as a matter of fact. The certificate bears date, November 8, 1898. (Recorded p. 54.) The Court adjourned on the 16th day of March, 1899. (Record, p. 61.) The question now presented, was for all practical purposes, settled against the Defendant in Error, in his motion at the last term of this Court, for a certiorari. Manifestly, for the purposes of this latter named motion, the Defendant in Error, requested the trial Judge, to endorse the day the certificate was actually signed. This endorsement was made on the 4th day of April, 1899. The certificate was actually signed, in term time,—before adjournment of the term. There is no limitation of the term, and a term only expires, when another begins. No good reason can be assigned, why the Judge may not hold cases open, to expedite its business, and try the same either at Birmingham or Huntsville, at such time as he may appoint. He has this power—there is no statute against it.

This Court will take judicial notice of the terms of Court, and the place of holding the same. The term at Huntsville commences on the first Monday in April, and this Court will take judicial notice of the fact, that the 4th day of April, 1899, was subsequent to the commencement of another term. The April Term convened by law on the 3rd day of April, 1899.

We submit that this endorsement made by the trial Judge on the 4th day of April, 1899, is not material. If it were material, the Judge would be absolutely without any power to impugn the record, which, at a former term, he had made for this Court. He had no intention of impeaching the record, by subsequent action, regarding it evidently as not affecting the rights of the Plaintiff in Error. The endorsement of April 4, 1899, if a judicial action, is void.

The trial was concluded on the 8th day of November, 1898. During the trial, the questions of jurisdiction were necessarily the subject of controversy. The questions of jurisdiction to be certified to this Court, were then made. The fact that the certificate was signed on the 15th day of March, 1899, instead of the 8th day of November, 1898, as the record recites. (Record, p. 54,) is in keeping with the common practice of the Court. The action of the Court may be carried within its breast during the entire term. It is not an uncommon thing to sign Executions, Citations and other proceedings, at the close of the term,—otherwise, it would be necessary to arrange all such proceedings before another case could be called for trial, thus blocking the docket, consuming the time of the Court, and causing an actual defeat in the administration of justice.

Birmingham and Huntsville are in the same District,—the Divisions of the District only are different. The Judge of the one, is the Judge of the other. Each place is within the jurisdiction, and the one as much as the other. It is not a case where the Judge acts without his jurisdiction,—in another State.

Under the provisions of Section 562 of the Revised Statutes, when the Court is held in more than one place in the District, and the place of keeping the records is not especially provided by law,

they may be kept at either of the places, as the Court may direct.

We submit that the motion to dismiss, if it were meritorious, comes too late. An appearance has been entered,—a motion for a certiorari has been made by Defendant in Error, and overruled by this Court.

United States vs. Armego, 131 U. S.
2 Foster's Practice, p. 1062.

Passing from the effort of the Defendant Error, to defeat the hearing of the cause, on the jurisdictional question,—the real merits of the controversy,—the Court will readily discover, that the Defendant in Error is mistaken in the assertion that no jurisdictional question is presented. Every artery of the case pulstates with the flow of jurisdictional matter. At all stages, the Plaintiff in Error, is insisting that the Circuit Court is without jurisdiction to hear the cause,—that it has no power to probate a will; and this primary question, the Plaintiff in Error, has been driven to bring this Court, although so often decided in accordance with the contention of the Plaintiff in Error.

The proceeding in the Probate Court of Madison County, Alabama, was to establish and probate the will of Mattie Lee Fennell, and such a proceeding is not a "suit of a civil nature, at law or in equity," and cannot be removed to a Federal Court. A Federal Court has no jurisdiction to admit a will to probate.

Dillon on Removal Causes, Sec. 42 (Note).
Frazer vs. Jennison, 106 U. S. 191.
Broderick's Will, 21 Wallace 503.
In re Frazer Case, 9 Fed. Cases, No. 5068, p. 729.
Reed vs. Reed, 31 Fed. Rep. 49.
In re Cilley 58 Fed. Rep. 977.
In re Foley 76 Fed. Rep. 390.
In re Foley 80 Fed. Rep. 949.
Gaines vs. Fuentes 92 U. S. 10.
Ellis vs. Davis 109 U. S. 485.
Byers vs. McAuley 149 U. S. 620.
Turner vs. Tarbet, 9th Peters 174.
Fouvergne vs. New Orleans, 18 Howard 470.

Frazer vs. Jennison, 106 U. S. 191.

In Re Frazer, 7 cent, Law Journal 227.

The petition for removal under the Act of Congress 1887-88, applies only to a defendant. The Defendant in Error was not a defendent in the cause pending in the Probate Court.

Section 4287 of the Code of Alabama (1896,) reads of follows: "A will, before the probate thereof, may be contested by any person interested therein, or by any person who if the testator had died, intestate would have been a heir or distributee of his estate. by filing in the Court where it is offered for probate, allegations in writing that the will was not duly executed, or of the unsoundness of mind of the testator, or of any other valid objection thereto; and thereupon an issue must be made up under the direction of the Court between the party making the application as plaintiff and the party contesting the validity of the will as defendant, and such issue must on the application of either party be tried by a jury."

In thus making up this issue, Walter E. Jordan, the proponent, become the plaintiff (not the defendant,) and Ada F. McDonnell, became the defendant (not the plaintiff.)

The present Defendant in Error, recognizing that he could not remove the cause, to Federal Court, if he was plaintiff, sought to inject himself into the State Probate Court, as a defendant, although his interest was directly antagonistic to the real defendant. If the Defendant in Error, had been permitted to intervene in the State Court as a defendant, the anomalous situation would have arisen, that the party claiming under, and the party claiming against the will, were both defendants; and when Walter E. Jordan, renounced his right to serve as Executor, the case was left without a plaintiff.

The application of Walter E. Jordan to make Llewellyn Jordan, a party defendant was denied by the Court, and the action of the Court was correct, because the Statute authorized no such intervention, the proponent, or plaintiff, representing the interests of Llewellyn Jordan, and because, under no circumstances, could he be made a defendant.

The proponent sought this forum,—the only forum for the probate of this will.

Kumpe vs. Coons, 63 Ala., 448 (455.)

The Record discloses the fact that the petition to probate the will was filed on the 9th day of February, 1897, in the Probate Court by W. E. Jordon, (Trans. p. p. 11 and 30), Ada F. McDonnell filed in the Probate Court her written contest of the will on the 11th of February, 1897, and thereupon an issue was made up, under the direction of the Court, between W. E. Jordan as plaintiff, and Ada F. McDonnell as defendant. (Trans. p. p. 13 and 22.)

The Record affimatively discloses the fact that W. E. Jordan, Proponent, filed his petition in the Probate Court asking that the Appellee, Llewellyn Jordan, be made a party defendent to the proceedings in the Probate Court. (Trans. p. p. 16 and 35.) The Record also shows that the Probate Court on August 3rd, 1897, denied the petion to make Llewellyn Jordan a defendant, (Trans. p. p. 17 and and 36.

The Record shows that on the 4th day of August, 1897, Llewellyn Jordan filed in the Probate Court a paper purporting to be an answer to the contest of Ada F. McDonnell, (Trans. p. p. 18 and 36.) The Transcript erroneously shows that the answer of Llewellyn Jordan was dated April 4th, 1897. The Record from the Probate appears twice in the Transcript in this cause. The answer of Llewellyn Jordan, appears in each of the Probate Transcripts as filed August 4th, 1897, (Trans. p. p. 18 and 36.)

This answer was filed with the affidavit of S. S. Pleasants as an "Exhibit," which was sworn to August 4th 1896, (Trans. p. p. 18 and 36.) The answer also appears in the Transcript from the Circuit Court of the United States with affidavit of S. S. Pleasants as an "Exhibit" August 4th, 1897, and marked "filed August 4th, 1897" in Probate Court, (Trans. p. p. 8, 9, and 10.) It is therefore manifest that dating the answer "April 4th, 1897" is a clerical error.

The Record shows that said answer or petition of intervention of Llewellyn Jordan, the Defendant in Error in this cause was improper and without authority filed in the Probate Court and was properly stricken from the files, (Trans. p. p. 19 and 37.)

The Record next shows that W. E. Jordan, the Proponent, on August 5th, 1897, renounced his right to have letters testamentary

issued to him, (Trans. p. p 20 and 38.)

The Record shows that the Defendant in Error was not a defendant at the commencement of the suit; that he was not a defendant in the cause then pending in the Probate Court at the time he filed his petition in the National Court for removal of the cause from the State Court.

Diversity of citizenship with the parties must exist at the time of the commencement of the action, and also at the time of the filing of the petition for the removal to the United States Circuit Court. It cannot be contended that Defendant in Error was a defendant at any time in the proceedings in the Probate Court. The contrary appears affirmatively from each of the Transcripts of the Probate Court in the Record of this cause.

Jackson vs. Allen, 132 U. S. 27.
Graves vs. Corbin, 132 U. S. 571.
Stevens vs. Nichols, 130 U. S. 230.
Fitzgerald vs. M. P. R. R. Co., 45 Fed. Rep. 812.
Grand Trunk R. R. Co., vs. Mitchell, 59 Fed. Rep. 727.

There is no law in Alabama, authorizing Llewellyn Jordan to be made a party to the probate proceeding. The question was presented to a Court of competent jurisdiction, and its adverse holding remains unreversed, and notwithstanding, the fact that he was elimated from the case, by this judgment of the Probate Court, he filed his petition in the Circuit Court of the United States, to remove a proceeding from the State Court, to which he was not a party.

The right of removal cannot be created by the introduction or intervention of new parties, whose interests were represented by a party previously in the record. Such party so far as removal is concerned is subject to all the disabilities existing at the time of commencement of the proceedings.

In Cabee vs. Ellis, 110 U. S. 389 the Court said:

"The application of an intervenor to have his rights settled in a suit can be entertained only as an incident to the original controversy, and whatever would bar a removal of suit before he intervened will bar him afterwards even although by his intervention he

may have raised a separate controversy."

Edrington vs. Jefferson, 111 U. S., 770.

Dillons Removal of Causes, Sec. 19, p. 111.

H. & Y. R. R. Co., vs. Shirley, 111 U. S., 358.

Hokes vs. Burns, 40 Fed. Rep. 33.

Hack, et al. vs. Chicago & G. S. R. R. Co., et al. 23 Fed. Rep. 356.

It is a patent from the record that W. E. Jordan, the Proponent, in his application to make the appellee Llewellyn Jordan, a defendant, and the renunciation that he made to have letters testamentary issued to him, was all done for the purpose of arranging the parties, so as to give jurisdiction to the Federal Court. But jurisdiction in the National Courts cannot be created by withdrawal or substitution or parties. It must exist in the due and regular course of litigation.

Farmers and Merchants National Bank vs. Schuster 86 Fed. Rep. 171.

Railway Co., vs. Shirley, 111 U. S., 358-361.

Railway Co., vs. Daughtry, 138 U. S., 298.

Fle'cher vs. Hamlett, 116 U. S., 408.

Burnham vs. First National Bank, 53 Fed. Rep. 163.

Jefferson vs. Driver, 117 U. S., 272.

Grand Trunk R. R. Co., vs. Mitchell, 59th Fed. Rep. 727.

Fox vs. Southern R. R. Co., 80 Fed. Rep. 945.

Walker et als. vs. Richards, et als. 55 Fed. Rep. 129.

Martin, Admr. vs. R. R. Co., 151 U. S., 673.

Stevens vs. Nichols, 130 U. S., 230.

Goldey vs. Morning News, 156 U. S., 418-24.

Edrington vs. Jefferson, (Supra.)

Hokes vs. Burns, (Supra.)

Hanrick vs. Hanrick, 153 U. S., 197.

Proceedings to admit a will to probate is not a seperate, but a single controversy and is therefore not removable.

Anderson vs. Appleton, 32 Fed. Rep. 855.

Reed vs. Reed, 31st Fed. Rep. 49.

Frazer vs. Jennison, 106 U. S., 191.
In Re Foely, 80 Fed. Rep. 949.
Watson vs. Asbury Co., 73 Fed. Rep. 1.
Robbins vs. Ellenberber, 71 Fed. Rep. 4.
In Re The Jarnuke Co., 69 Fed. Rep. 161.
Dillion's Removal of Cases, (5 ed) Sec. 44.
In Re Frazer, 9 Fed. Cas. Nos 5068, 729.

Statute of Alabama, regulating the jurisdiction of Probate Courts. The execution and probate of wills, in force (1896) at the time the petition to probate the Will of Mattie Lee Fennell was filed in Probate Court, Madison County, Alabama: Section 3363 "Courts of Probate have in the cases defined by law, original jurisdiction of, 1. "The Probate of Wills."

4263. (Code Ala.,) "Wills to be in writing—How signed and attested."

"No Will is effectual to pass real or personal property, except in the cases hereinafter provided for, unless the same is in writing, signed by the testator or some person in his presence, and by his direction and attested by at least two witnesses who must subscribe their names thereto in the presence of the testator."

Sec. 4172. "Who may have the Will probated."

"Upon the death of a testator, any executor, devisee or legatee named in the will or any person interested in the estate, may have the will proved before the proper Probate Court."

Sec. 4273. "In what Court will to be proved. '

"Wills must be proved in the several Probate Courts as follows: First,—when the testator at the time of his death was an inhabitant of the county, the Probate Court of such county."

Sec. 4276. "Mode of proving wills not nuncupative."

"Wills offered for probate except nuncupative wills must be proved by one or more of the subscribing witnesses, or if they be dead, insane or out of the State, or have become incompetent since the attestation, then by the proof of the handwriting of the testator, and that of at least one of the witnesses to the will."

Sec. 4279. "Testimony to be recorded with the will."

"If it appears on the proof taken before the Judge of Probate, that the will was duly executed, the testimony of the witnesses must be reduced to writing by him, signed by the witnesses and with the will recorded in a book provided for that purpose."

Sec. 4280. "Certificate endorsed on will; contents."

"Every will so proved, must have a certificate endorsed thereon, setting forth in substance, that such will has been duly proved and recorded with the proof, specifying also the date of probate the book, in and page or pages on which it is recorded, which endorsement must be signed by such Judge of Probate."

McCutcheon vs. Loggins, 109 Ala. 462.
Kumpe vs. Coons, 63 Ala. 448.
Matthews vs. Sprague, 16 Fed. Cases 9278. page 1103.
Adden vs. Goodman, 77 Ala., 521.
Dickey vs. Vann, 81 Ala. 425-430.

In the strained effort to give the National Courts jurisdiction the petition for removal states: "The said will is duly probated" by by the affidavit of S. S. Pleasants; said will was filed in said "Probate Court for probate in common form and is so probated." (Transcript, pape 2, 18 and 36.)

We respectfully refer the Court to case of Acklen vs. Goodman, 77 Ala. 521.

The will of Mattie Lee Fennell was never probated in any form. The affidavit of the attesting witness, S. S. Pleasants, was not a probate of the will. A will can only become probated through a judicial ascertainment by a Court of competent jurisdiction. The affidavit of an attesting witness, can never dispense with the judicial act of the Court. When a will has thus been verified, or otherwise established under the statute, and when it has been judicially determined to be the will of the testator, it then becomes probated in common form. The present record discloses that the case had not reached this point, when the petition for removal was filed. The record does not contain a certificate, setting forth that such will has been duly proved and recorded, as required by Section 4280 of the Code of Alabama. The cause had not so far pro-

gressed,—the petition for removal arrested the proceeding, and removed it to the Circuit Court, where this issue was the matter of litigation. A contest as to the validity of a will, does not become a suit in solemn form, until the will has been so probated in the Court of Probate and until a proceeding in the Chancery Court has been commenced, as provided by Section 4296 of the Alabama Code. This latter section, provides the remedy for a probate as in solemn form.

Knox vs. Paull, 95 Ala., 505 (509.)
Matthews vs. Forniss, 91 Ala., 157.
Johnston vs. Glasscock, 2 Ala., 218.
Lyons vs. Campbell, 88 Ala., 462.

Thus, we see very clearly, that the title of the devisee must first be established by a decree of the Probate Court. If the heir desires to contest the probate in solemn form, a Bill in Equity, as provided by Section 2598, is the method of procedure, thus superseding the common law practice of an action of ejectment, wherein the devisee could defend under the will as a muniment of title, showing its validity and due execution.

We submit, therefore, that it is not possible for the Defendant in Error, to avoid his position as plaintiff in the cause, if he has any position whatever,—just where the statute places him. Seeking the privileges of the statute, he cannot deny its requirements.

There are other cogent reasons, why the Circuit Court did not have jurisdiction of the cause.

The petition for the removal of the case at bar, from the Probate Court of Madison County, Alabama, to the Circuit Court of the United States for the Northern District of Alabama, was brought under the last clause of Section 2 of the Act of Congress, approved August 13th, 1888, on account of "prejudice or local influence."

Supplement Revised Statutes U. S., 611-613.

The Court erred in refusing to grant motion to remand. (Transcript, p. p 40 and 50.) The manifest purpose of the Congress in Acts of 1887-88 was to restrain the volume of litigation pouring into the Federal Courts.

Fisk vs. Hinare 142 U. S., p. 459.
Shaw vs. Quincy Ins. Co. 133 U. S., p. 315.
In re Cilley, 58 Fed. Rep., 980.
Hanrick vs. Hanrick 153 U. S., 197.
Missouri R. R. vs. Fitzgerald 160 U. S., 585.
Fox vs. Southern R. R. Co., 80 Fed. Rep. 945.
Martin vs. R. R. Co., 151 U. S. 673.
In re Pennsylvania Co., 137 U. S. 451.

The Appellant contends that the United States Circuit Court was without jurisdiction, and the motion to remand to the Probate Court of Madison County, Alabama, (Trans. p. p. 40 and 50) should have been granted, and for grounds of contention says:

First. The petition for removal to the U. S. Circuit Court was presented and filed in said Circuit Court after a trial of the cause in the Probate Court in Madison County, Alabama, and was therefore too late, and did not give jurisdiction to the Federal Court.

Second. The proceedings sought to be removed from the Probate Court of Madison County, Alabama, is a matter of probate jurisdiction and inquiry, and is not a "suit of a civil nature at law or equity," within the meaning of the Acts of Congress 1887-88, and a Federal Court has no original cognizance of such a proceeding nor can it acquire jurisdiction by removal.

Third. The Circuit Court of the United States, Northern Division, Northern District of Alabama, has no jurisdiction under the removal Acts of Congress 1887-88 to hear, try, determine or pass upon a proceeding to admit a will to probate.

Fourth. At the time of the filling of the petition in this cause for removal to the Circuit Court of the United States, there was no controversy in the Probate Court of Madison County, Alabama, between a citizen of the state of Alabama, and a citizen of another state, which was necessary to give a Federal Court jurisdiction.

Fifth. The Appellee in this cause, at the time of the signing of the petition for removal and making the affidavit, was not a defendant in any suit, proceeding or controversy in the Probate Court of

Madison County, Alabama, related to, connected with or concerning the matter of the probate or contest of the will of Mattie Lee Fennell, deceased, and under the provisions of the Acts 1887-88 a defendant only is entitled to remove a cause from a State Court to a Federal Court.

Sixth. The proceeding or action in the Probate Court of Madison county, Alabama, to establish and admit to probate the will of Mattie Lee Fennell, deceased, is not a seperate, but single controversy and its removal to a Federal Court is not authorized by the Acts of Congress 1887-88.

Seventh. The Probate Court of Madison county, Ala., is a court of record and has general, original and exclusive jurisdiction of the proceedings to establish and admit to probate a will, and at the time of the filling of the petition for removal, the Probate Court had taken cognizance of and was proceeding to hear and determine the cause at bar.

THE PETITION FOR REMOVAL TOO LATE.

If Appellant's contention is right that the petition for removal from the Probate Court to the Circuit Court of the United States was filed after a trial of the cause had taken place in the Probate Court and mistrial entered, then under the settled construction given by the Federal Courts of the language of the Act of Congress 1888, viz: "At any time before the trial thereof" rhe petition for removal was filed too late, and the Federal Court had no jurisdiction, and there will be no necessity for this Honorable Court to enquire into other matters or questions presented in the record.

It affirmatively appears from the Record that on the first day of April, 1897, a jury was empannelled and sworn in the Probate Court of Madison county, Ala., to try the issues made up in the contest of the will of Mattie Lee Fennell, deceased, (Trans. p. p 15 aud 35.) On the 15th day of April, 1897, the jury reported to the Court that they had been unable to agree on a verdict. The Court discharged the jury, and continued the cause. (Trans. p. p. 16 and 35.

The petition for removal from the Probate Court of Madison County, to the Circuit Court of the United States for the Northern Division of the Northern District of Alabama, was presented and filed on the 12th day of August, 1897. (Trans. p. p. 1, 2, 3, 4 and 5.)

It was insisted by counsel for appellee in the lower court that the mistrial in the Probate Court did not bar the petition for removal and the lower court held that the petition for removal was filed "before the trial thereof." In effect that a mistrial was not a trial of the cause. Appellant contends that such is not the law. In the case of Fisk versus Henarie, 142 U. S. page 459, Chief Justice Fuller in rendering the opinion of this Honorable Court, where a petition for removal was filed after the cause had been tried three times in State Court, said:

"In view of the repeated decisions of this Court in exposition of the Acts of 1866, 1867 and 1875, it is not to be doubted that Congress recognizing the interpretation placed on the word "final" in connection in which it was used in the prior acts and the settled construction of the Acts of 1875, deliberately changed the language "at any time before the final hearing or trial of the suit," or at any time before the final hearing of the cause," to read "at any time before the trial thereof," as in the Act of 1875 which required the petition to be filed before or at the term at which the cause could first be tried and before the trial thereof." We are of opinion that the application for removal came too late."

In Farmers and Merchants National Bank of Waco vs. Schuster et al, 36 Federal Rep., page 161, decided in the Circuit Court of Appeals, Fifth Circuit, the first head note, reads: "After a cause has been tried in a State Court and a mistrial entered, it cannot be removed on account of local prejudice." The Judge rendering the opinion of the Court used this language:

"The petition for removal was presented and the removal allowed it will be perceived, after the case had been tried and mistrial entered in the State Court. The question as to the stage at which a case may be removed from a State Court to the

Circuit Court of the United States under the local prejudice clause of the Act of March 3rd, 1887, seems to have been fully settled by the Supreme Court in Fisk vs. Henarie, 142 U. S. 459-12 in which case the words "at any time before the trial thereof was construed, and its meaning settled."

Gregory vs. Boston Safe Deposit Co., 88 Fed. Rep. 3.
Young vs. Andes Ins. Co., Fed. Cases, Case 18, 151, p. 839.
Martin vs. B. & O. R. R. Co., 151 U. S. 687.
B. & O. R. R. Co. vs. Burns 174 U. S. 165.
Edrington vs. Jefferson, 111 U. S. 770.
Fox vs. Southern R. R. Co., 80 Fed. Rep. 945.
Ayers vs. Watson, 113 U. S. 594.
Guerney vs. Brunswick, 11 Fed. Cases, Case 5872, p. 117.
Alley vs. Note, 111 U. S. 472.
American Bible Society vs. Grove, 101 U. S. 610.
Holland vs. Chambers, 110 U. S. 59.
Babbett vs. Clark, 103 U. S. 606.
Myers vs. Swann, 107 U. S. 546.
Rosenthal vs. Coates, 148 U. S. 142.

The Statute of Alabama here referred to in connection with above authorities: Section 3371 of the Code of Alabama, 1896, viz: Sec. 3371, "Regular and Adjourned Terms, "When Court Always Open." "A Court of Probate must be held at the Court House of each county on the second Monday in each month, and the Judge may hold special or adjourned terms at any time whenever necessary for any special purpose."

Supplemental:

The record discloses the fact that the question of jurisdiction was presented prior to the certificate signed on Nov. 8th, 1898. (Record page 48. 49 and 50).

In re Lehigh Min. Co., 156 U. S., 322.
Shields v. Coleman, 157 U. S., 168.
United States v. Jahn, 155 U S., 109.
Interior Construction Co. v. Gibney, 160 U. S. 217.
Smith v. McKay, 161 U. S., 355.

Van Wagenen v. Sewall, 160 U. S., 369.

If this cause could thus be lifted from the Probate Court, without any probate of the will therein, may we not inquire what machinery of the Federal practice could carry it into effect, and administer it?

WILLIAM RICHARDSON,
LAWRENCE COOPER,
Attorneys for Plaintiff in Error.

Office Supreme Court U. S.
FILED
APR 21 1900
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 253.

ADA F. McDONNELL, PLAINTIFF IN ERROR,

vs.

LLEWELLYN JORDAN, DEFENDANT IN ERROR.

Comparative Numbers of Sections of Codes of Alabama. Filed by leave of the Court.

Code 1886.	Code 1896.
Section 1989	is section 4287.
Section 1966	is section 4263.
Section 1975	is section 4172.
Section 1976	is section 4173.
Section 1979	is section 4276.
Section 1982	is section 4279.
Section 1983	is section 4280.
Section 2000	is section 4296.

Section 2598 on page 15 of brief is an error and refers to section 4296 of the Code of 1896.

LAWRENCE COOPER,
Attorney for Plaintiff in Error.

No. 770. 253

Brf. of Walker for D. C. (Motion.)

Office Supreme Court U. S.
FILED
APR 17 1899
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States,

October Term, 1898.

No. 770.

Filed April 17, 1899.

ADA F. McDONNELL, PLAINTIFF IN ERROR,

vs.

LLEWELLYN JORDAN, DEFENDANT IN ERROR.

BRIEF OF COUNSEL FOR DEFENDANT IN ERROR ON MOTION FOR WRIT OF CERTIORARI, ON SUGGESTION OF DIMINUTION OF RECORD.

The motion submitted to the court is as follows:

"Comes Llewellyn Jordan, the Defendant in Error in the above entitled cause, by his counsel, Richard W. Walker, and represents and shows unto the court: Final judgment was rendered in said cause on the 8th day of November, 1898, at a regular term of the Circuit Court for the Northern Division of the Northern District of Alabama. The writ of error to review said judgment was sued out and granted on the 15th day of March, 1899, as appears by the transcript of the record filed in this court. Though the right to review said judgment is based solely on the fact that the case is one in which the jurisdiction of the Circuit Court was in issue, the certificate to this court of the questions of jurisdiction

sought to be reviewed was not made by the said Circuit Court during the term at which said judgment was rendered, but was made and signed on the 15th day of March, 1899, at Birmingham, Alabama, by the Honorable John Bruce, the District Judge for the Northern and Middle Districts of Alabama. When said certificate was so made and signed on the 15th day of March, 1899, the Circuit Court of the United States for the Northern Division of the Northern District of Alabama was not in session, and had not been in session since the 9th day of November, 1898. On said 9th day of November, 1898, an order in words as follows was made and entered in said Circuit Court: 'It is ordered by the court that all causes, motions and matters now pending in this court not otherwise disposed of be, and the same are hereby continued to the next term of this court.' The said Hon. John Bruce, who had presided in said Circuit Court at the term at which said judgment was rendered, left the city of Huntsville on said 9th day of November, 1898, and neither he nor any other judge held any session of said court in said Northern Division from that date until the first Monday in April, 1899, when the regular term of said court commenced. From the 6th day of March, 1899, until after the 16th day of March, 1899, the said Hon. John Bruce was holding the regular term of the Circuit and District Courts for the Southern Division of the Northern District of Alabama in the city of Birmingham in said Southern Division. There appears in the transcript of the record in this cause an order, dated March 16th, 1899, signed by said Hon. John Bruce, purporting to finally adjourn said Circuit Court for said Northern Division, but said transcript of said record does not contain the general order of continuance hereinbefore set out. Said Hon. John Bruce was not in the Northern Division of the Northern District of Alabama when said order dated March 16th, 1899, was signed.

The answer of Llewellyn Jordan, which is a part of the transcript of the record of the Probate Court of Madison County, State of Alabama, as the same appears on page 22 of the transcript of the record of the Circuit Court which has been certified to this court, is not a correct copy of said answer as it appears in said original transcript from the

Probate Court on file in the Circuit Court, in that the true date of said answer as it appears in said original transcript is August 4th, 1897, while said date in the transcript sent to this Court is April 4th, 1897. The affidavit of S. S. Pleasants, which is annexed to said answer of Llewellyn Jordan, is incorrectly copied on page 46 of the transcript of the record transmitted to this Court, in that the date on said page 46 is the 4th day of April, 1897, whereas the true date as it appears in said original transcript from said Probate Court, on file in this cause in the Circuit Court, is August 4th, 1897.

On the 8th day of November, 1898, an order was made and entered in this cause by said Circuit Court allowing the plaintiff in error herein ninety days for preparing and having filed a bill of exceptions. By an order made on January 26th, 1899, by the said Hon. John Bruce, at Chambers in the city of Montgomery, Alabama, the time for preparing the bill of exceptions was extended ten days. By an order made by said Hon. John Bruce at Chambers on February 4th, 1899, said time was again extended to February 9th, 1899. By an order made at Chambers by said Judge on February 9th, 1899, said time was again extended to February 16th, 1899. By an order made at Chambers in Montgomery, Alabama, by said Judge, on February 17th, 1899, it was ordered that said time be again extended to March 6th, 1899. None of said orders in reference to a bill of exceptions, though they were duly entered upon the order book of said court, are copied into the transcript of the record transmitted to this Court.

To the end that this Honorable Court may be more fully informed as to whether said certificate of questions of jurisdiction was made by the Circuit Court of the United States for the Northern Division of the Northern District of Alabama, or merely by the Judge who had presided after the term of the court had ended, and to the end that the transcript of the record in this cause in the Circuit Court may be correctly and fully certified to this court, the defendant in error moves the court to order its writ of *certiorari* to issue commanding the Clerk of the Circuit Court for the Northern District of Alabama to certify under the seal of the court any general order of continuance made by said court in the Northern Division of said District on the 9th day of November, 1898;

also all orders made and entered in this cause allowing or extending time for preparing and filing a bill of exceptions; also the answer of Llewellyn Jordan, with the affidavit of S. S. Pleasants filed therewith, with any indorsements or dates thereon, as the same appear in any transcript of record from the Probate Court of Madison County, Alabama, on file in this cause in said Circuit Court; and also whether any session of said Circuit Court for said Northern Division of the Northern District of Alabama was held by any judge, being present and presiding therein, after the 9th day of November, 1898, and before the next regular term of said court. And the defendant in error moves the court to make such other or further order in the premises as the facts may warrant.

RICHARD W. WALKER,
Attorney for Defendant in Error.

STATE OF ALABAMA, }
MADISON COUNTY. }

Richard W. Walker, being duly sworn, says that he is the attorney of record for the defendant in error in the above entitled cause, and that the allegations contained in the foregoing motion are true.

RICHARD W. WALKER.

Subscribed and sworn to before me, this 12th day of April, 1899.

[Seal.] ED. E. GREENLEAF,
U. S. Commissioner.

To Ada F. McDonnell, Plaintiff in Error in the above entitled cause, and Willliam Richardson, Esq., and Lawrence Cooper, Esq., attorneys of record for said Plaintiff in Error in said cause:

Take notice that the foregoing motion will be submitted to the Supreme Court of the United States, on Monday, the 24th day of April, 1899.

RICHARD W. WALKER,
Counsel for Defendant in Error.

Received copy of the foregoing motion and notice, this 12th day of April, 1899.

LAWRENCE COOPER,
WILLIAM RICHARDSON,
Attorneys for Plaintiff in Error."

BRIEF.

The Act of Congress of May 2nd, 1881, (23 Stat. L. 18; 1 Sup. R. S. p. 427) requires the terms of the Circuit and District Courts for the Northern Division of the Northern District of Alabama to be "held therein at the times and place now prescribed by law." The law then in force (1 Supplement to Revised Stat. p. 38) prescribed the city of Huntsville as the place for holding said courts, and fixed the times for holding the regular terms.

To give existence to the court, its officers, and the time and place of holding it must be such as are prescribed by law. When a statute fixes a time and place for a court to sit and exercise its jurisdiction, it cannot lawfully do so at any other time *or place*.

Hobart vs. Hobart, 45 Iowa, 503.
In re Terrill, 52 Kan. 29; 39 Am. St. Rep. 327.
Bacon's Abridgment, tit. "Court", A.
Hawes on Jurisdiction of Courts, sec. 27.
Garlick vs. Dunn, 42 Ala. 404.
Northrup vs. People, 37 N. Y. 205.

The statutes prescribing methods of adjournment in the absence of a judge very clearly imply that a court cannot be a "going concern" without the actual presence of a presiding judge. Rev. Stat. U. S. secs. 671, 672. There is the same implication in the various provisions and rules conferring special powers on judges of courts not in session, and as to matters in reference to which courts are deemed be always open.

The certificate of the question of jurisdiction is an act of the court required to be done during the term.

Colvin vs. Jacksonville, 158 U. S. 456.
Chappell vs. United States, 160 U. S. 507.

The record in this case does not show that the certificate of questions of jurisdiction was made by the court while in session, but the insertion of an order of final adjournment

dated after the certificate was signed is evidently intended as the foundation for an inference by this Court that the Circuit Court was in session until the date of the order for final adjournment. The recital of facts in the motion now made shows that any such inference would be wholly unfounded. The writ of certiorari is properly used to bring up to the court of error outbranches of the record which show material facts more fully than are shown by the record as certified.

United States vs. Adams, 9 Wallace, 661.

The Court should be fully advised of the facts that at the time the certificate of questions of juristiction was signed a general order of continuance of all causes had been entered; that no judge was present and there was no session of the court after the date of that general order of continuance; and that the judge who had presided made several orders extending the time for signing a bill of exceptions, which would not have been made if the term of court had not ended. The recital of facts in the motion shows that at the time Judge Bruce signed the certificate he was holding the regular term of the Circuit and District Courts at Birmingham in the Southern Division of said District. The fact is that at the time the certificate was signed in Birmingham the Circuit Court was not in session at Huntsville. This would affirmatively appear from the return made to the writ of *certiorari* moved for. It is presumed that in reference to a matter so vital to the maintenance of the writ of error as the question whether the term of the Circuit Court had come to an end before the certificate of questions of jurisdiction was signed this court would require that nothing be left to inference which could be made plain by an official certification.

Respectfully submitted,

RICHARD W. WALKER,

Attorney for Defendant in Error.

No. 253.

Brief of Walter & May for D. & E.

FILED
OCT 10 1899
JAMES H. McKENNEY
Clerk

Filed Oct. 10, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1899.

ADA F. McDONNELL,
Plaintiff in Error,
vs.
LLEWELLYN JORDAN,
Defendant in Error.

No. 253.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

MOTION TO DISMISS OR AFFIRM, AND BRIEF IN SUPPORT OF MOTION.

RICHARD W. WALKER,
HEBER J. MAY,
Attorneys for Defendant in Error.

MILANS, PRINTER, 918 E ST., N. W., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

ADA F. McDONNELL,
Plaintiff in Error.

vs.

LLEWELLYN JORDAN,
Defendant in Error.

No. 253.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

Motion to Dismiss or Affirm and Brief in Support of Motion.

Comes the defendant in error herein and moves the Honorable Court to dismiss this writ of error, as this court has no jurisdiction thereof; or to affirm the judgment, it being manifest that, even if the court has jurisdiction, the question on which the jurisdiction depends is so frivolous as not to need further argument, and that the writ was taken for delay only.

RICHARD W. WALKER,
HEBER J. MAY,
Attorneys for Defendant in Error.

To William Richardson, Esq., and Lawrence Cooper, Esq., attorneys of record for Plaintiff in Error in the above entitled cause.

You are hereby notified, that the defendant in error in the above named cause will, on Monday the 30th day of October, A. D. 1899, on the meeting of the Supreme Court of the United States, on that day, or as soon thereafter as counsel can be heard, submit for the consideration of the court the foregoing motion, and the brief thereon hereto attached.

RICHARD W. WALKER,
HEBER J. MAY,
Attorneys for Defendant in Error.

Service of the foregoing motion and brief in support of the same is hereby admitted this 7th day of October, 1899.

William Richardson

Lawrence Cooper.

Counsel for Plaintiff in Error.

BRIEF OF COUNSEL FOR DEFENDANT IN ERROR ON MOTION TO DISMISS OR AFFIRM.

The plaintiff in error, Ada F. McDonnell, a citizen of Alabama, having instituted a contest of the instrument filed for probate as the last will and testament of her sister, Mattie Lee Fennell, the defendant in error, Llewellyn Jordan, a citizen of Mississippi, the sole legatee and devisee under that instrument, filed his answer to the statement of grounds of contest, and removed the contest

from the State Probate Court into the Circuit Court of the United States, on the ground of prejudice or local influence. The contest was tried in the Circuit Court, resulting, on the 8th day of November, 1898, in a verdict and judgment in favor of the contestee. (Printed record, p. 53.) No ruling of the lower court was reserved by bill of exceptions, but the contestant sued out a writ of error on the 15th day of March, 1899, (Record, p. 55); and on that day the judge who had presided undertook, at Birmingham, Alabama, outside of the Northern Division of the Northern District of Alabama, to certify questions of jurisdiction to this court. The defendant in error now moves the court to dismiss the writ of error, or to affirm the judgment of the Circuit Court.

The following propositions are submitted:

1. That the court is without jurisdiction of the writ of error, as no question of jurisdiction has been "certified to the Supreme Court from the court below for decision," as required by the provision of section 5 of the Act to establish Circuit Courts of Appeals, &c.

2. That, if the court has jurisdiction of the writ of error, the questions sought to be presented are not properly before the court, as they are not presented for review by any bill of exceptions.

3. That the case is plainly one of which the United States Court could acquire jurisdiction.

4. That, even if the motions to remand, to strike, &c., can be considered as properly disclosed by the record, the rulings of the lower court were correct, and the judgment should be affirmed.

I. The Certificate of the Questions of Jurisdiction was not made by the Circuit Court during the Term at which the Judgment was Rendered.

That such certificate is an act of the court required to be done during the term is well settled by the decisions.

Colvin v. *Jacksonville, 158 U. S., 456.*
Chappell v. *United States, 160 U. S., 507.*

The record shows (printed record, p. 54) that the certificate was made by the Hon. John Bruce, the judge who had presided, at Birmingham, Ala., on the 15th day of March, 1899. The certificate recites that the plaintiff in error had prayed for and obtained a writ of error. The record shows (printed record, pp. 55,58) that the petition for the writ of error and the assignment of errors were not made or filed until March 15th, 1899. It thus plainly appears, outside of the statement of the judge to that effect, that the date, November 8, 1898, of the filing and signing of the certificate did not speak the truth, and that no certificate was made by anyone until the 15th day of March, 1899.

In this state of the record it plainly appears that the certificate was not made by the court while in session. It shows that the judge who had presided was no longer in the Northern Division of the Northern District of Alabama. The Circuit Court for that Division could not be held by a judge outside of the territorial limits of the Division. The Act of Congress of May 2d, 1884, (23 St. L., 18; Sup. R. S., p. 427) requires the terms of the Circuit and District Courts for the Northern District of Alabama to be "held therein at the times and places now prescribed by law". The law then in force (1 Supplement to Rev. St., p. 38) prescribed the City of Hunts-

ville as the place for holding said courts, and fixed the times for holding the regular terms.

Where the statute names the specific place for holding court, it cannot be legally held elsewhere. The presence of a presiding judge at a place where the court is authorized to be held is essential to the existence of a court, There is no court unless its officers, and the time and *place* of holding it, are such as are prescribed by law.

Hobart v. *Hobart*, 45 Iowa, 503.
In re Terrill, 52 Kan., 29; Am. St. Rep., 327.
Bacon's Abridgment, tit. "Court", A.
I Ency. of Pleading & Practice, p. 243.
Hawes on Jurisdiction, sec. 27.
Garlick v. *Dunn*, 42 Ala., 404.
Northrup v. *People*, 37 N. Y., 205.
People v. *Sullivan*, 115 N. Y., 185.

The statutes prescribing methods of adjournment in the absence of a judge very clearly imply that a court cannot be a "going concern" without the actual presence of a presiding judge. Rev. St. U. S., Secs. 671, 672. There is the same implication in the various provisions and rules conferring special powers on judges of courts not in session and as to matters in reference to which courts are deemed to be always open. Except as to the special instances thus provided for, the court is not in existence for any purpose without the actual presence of a competent presiding judge at the place prescribed by law.

The court takes judicial notice of the times and places prescribed by law for holding the Circuit Courts. 12 Am. & Eng. Ency. of Law, 182, 183. It is shown by an affidavit filed on a motion for a writ of *certiorari* in this case, that on the 15th day of March, 1899, Judge Bruce was holding the regular term of the Circuit and District

Courts of the Southern Division of the Northern District of Alabama, at Birmingham, Ala.

That the court was in session when the certificate was made cannot be inferred from the fact that the record contains an order of final adjournment, dated March 16th, 1899, when the record affirmatively shows that the signing of the certificate was by the judge outside of the Division; and so was not an act of the court, but was merely the act of a judge, who was not authorized by law to perform this function of the court at the place where the act was done.

A certificate was essential in this case. Under the statute giving the right to an appeal or writ of error to this court "in any case in which the jurisdiction of the court is in issue", the extent of the losing party's right is to have a review by this court of the rulings of the lower court on specific questions of jurisdiction, which "alone shall be certified to the Supreme Court from the court below for decision". The right to obtain a revision is limited by the statute. Not only must the case be one "in which the jurisdiction of the court is in issue", but the lower court must rule on such question of jurisdiction, and such question must be certified. The right to a revision is made dependent upon a due presentation of such question by the lower court to this court. The writ of error does not remove the entire case to this court. It is not incumbent upon this court to search through the record to find if questions of jurisdiction are lurking there which were not raised in the lower court. The court will do this where the writ of error operates to bring before it, for its revision generally, the record of the lower court; but the plaintiff in error certainly has no right to such general revision of the record where the scope of the writ of error, as fixed by the statute, is to present for re-

view only rulings of the lower court on specific questions of jurisdiction. It will be shown later on that the *record* does not disclose that any question of jurisdiction was presented to the lower court for its decision. In such a case as this not only must the record show that there was a ruling on a question of jurisdiction, but the question must be certified.

II. The motion to remand, and the other motions referred to in the assignment of errors, and the rulings of the court thereon, not having been made a part of the record by incorporation in a bill of exceptions, the rulings of the trial court which are the objects of such assignments of error are not presented for review on this writ of error.

Let it be conceded that the certificate was made by the court during the term, yet it could present for review here only such questions of jurisdiction as the *record* shows were involved in the decision below. *Chappell* v. *United States*, 160 U. S., 507. The various motions, to remand, to strike, &c., which are copied in the transcript transmitted from the court below, form no part of the *record* in the case, as they are not presented for review by any bill of exceptions. Such motions, and the rulings of the court theron, must, in order to be reviewed on appeal or writ of error, be taken up on a bill of exceptions. 3 Ency. of Pleading and Practice, p. 392. A bill of exceptions is necessary to put into the record that which would not properly appear without it. *The S. C. Tryon*, 105 U. S. 267; *New York &c. Co.*, v. *Madison*, 123 U. S. 524. The mere insertion of such motions in the transcript sent up by the clerk does not make them a part of the record to be reviewed by this court. The rule pre-

vailing in Alabama, that the only method by which the ruling of the lower court upon a motion can be reviewed by an appellate court is by incorporating the motion in a bill of exceptions (*Ewing* v. *Wafford*, 25 So. Rep., 251), also prevails in this court. In this regard rulings upon motions stand upon the same footing as rulings on instructions asked. In reference to such rulings, this court said, in the opinion in the case of *Clune* v. *United States*, 159 U. S. 590:

"Finally, there is a claim of error in the instructions, but the difficulty with this is that they are not legally before us. True, there appears in the transcript that which purports to be a copy of the charge, marked by the clerk as filed in his office among the papers in the case; but it is well settled that instructions do not in this way become a part of the record. They must be incorporated in a bill of exceptions, and thus authenticated by the signature of the judge. This objection is essentially different from that of the lack or sufficiency of exceptions. An appellate court considers only such matters as appear in the record. From time immemorial that has been held to include the pleadings, the process, the verdict, and the judgment, and such other matters as by some statutory or recognized method have been made a part of it."

It has been several times decided that a motion to remand cannot be considered by an appellate court unless it appears in a bill of exceptions. 3 Ency. of Pleading and Practice, 393,395. The ruling of the trial court on the motion to remand cannot be reviewed by this court on the pending writ of error because the motion is not in any proper way made a part of the record certified to this court. The fact that any such motion was made cannot be recognized. The case is to be treated as if the trial had been had in the lower court with-

out any objection being made to the removal proceedings.

In the case of *Stern* v. *Collier*, 101 Ala., 424, the effort was to have the Supreme Court review the action of the trial court in overruling a motion to set aside and vacate an order contained in a judgment entry. The court declined to consider the question, and dismissed the appeal, saying:

"But the question is not presented by this record. We find in the transcript motions to set aside the orders, denials of the motions, and recitations that 'moveant excepted.' None of these matters belong to the *record* of the court below. They could only be made a part of the record for the purposes of appeals by bills of exceptions. Neither one of the transcripts contains a bill of exceptions. We are not allowed to consider these matters unless they are certified to us in the only way provided by law-incorporated in bills of exceptions, signed by the presiding judge, and transcribed and certified to us by the clerk of the court."

The petition for removal (Printed Record, pp. 1, 2) shows the requisite diversity of citizenship and value of the matter in controversy to confer jurisdiction on the United States Court. Any objections going merely to the time or mode of getting the case into the United States Court could be waived by a party. Any such objections in this case are to be treated as not having been made at all, but as having been waived, as they have not been brought into the record by a bill of exceptions. The provisions of the removal statute as to the form of proceeding to effect a removal, and as to the time of applying for a removal, are not jurisdictional, but are merely formal and modal, and may be waived. *Ayers* v. *Watson*, 113 U. S., 594.

"Diversity of citizenship is a condition of jurisdiction, and, when that does not appear upon the record, the court of its own motion, will order the action to be dismissed. But the provisions as to the particular district in which the action shall be brought does not touch the general jurisdiction of the court over such a cause between such parties; but affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege, which the defendant may insist upon, or may waive, at his election; and the defendant's right to object that an action, within the general jurisdiction of the court, is brought in the wrong district, is waived by entering a general appearance, without taking the objection." *Interior Construction & Imp. Co.*, v. *Gibney*, 160 U. S., 217.

In the present case, any objections as to the mode and time of the removal into the Federal Court or as to the party by whom the removal was effected, did not "touch the general jurisdiction of the court over such a cause", but went merely to matters of procedure, rulings upon which are not reviewed by the appellate court unless properly presented for its revision.

It is submitted that all questions as to the mode or time of getting the case before the United States Court have been waived so far as this court is concerned by the failure to reserve such questions for review; and that, whether the certificate is sufficient or not, nothing more can be considered than the bare question whether the record discloses a case of which the United States Court could in any way acquire jurisdiction.

III. The case is one of which the United States Court could acquire jurisdiction.

The Act of 1887–'88 authorizes a removal on the ground of prejudice or local influence, by a defendant

who is a citizen of another State, "where a suit is now pending, or may be hereafter brought, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State", etc.

Any proceeding which comes within the description, "a suit * * * in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State", is within the grant of jurisdiction.

It is submitted that a consideration of the Alabama statute providing for the contest of wills leads inevitably to the conclusion that such a contest is a "suit," within the meaning of the removal statutes.

After making provision for proving wills in the Probate Court, upon giving notice to the widow and next of kin in a manner prescribed, (Code of Ala. 1896, Secs. 4273, 4284, 4285), the following provisions, sections 4287 and 4298 respectively, of the Code of Alabama of 1896, are made for contesting the validity of wills.

"*Contest; Grounds* and by *whom instituted; how issue made up and tried.* A will before the probate thereof, may be contested by any person interested therein, or by any person who if the testator had died intestate, would have been an heir or distributee of his estate, by filing in the court where it is offered for probate allegations in writing that the will was not duly executed, or of the unsoundness of mind of the testator, or of any other valid objection thereto; and thereupon an issue must be made up, under the direction of the court, between the person making the application, as plaintiff, and the person contesting the validity of the will, as defendant; and such issue must, on application of either party, be tried by a jury."

"*Contest in Chancery within eighteen months.* Any person interested in any will, who has not contested the same under the provision of this article, may, at any time within eighteen months after the admission of such will to pro-

bate in this state, contest the validity of the same by bill in Chancery, in the district in which such will was probated, or in the district in which a material defendant resides."

A proceeding for the probate of a will is

These statutes provide the only modes now recognized by the law of Alabama of determining the question of the existence *vel non* of an alleged will. They supersede all common law methods of determining that question, establishing an entirely new system of procedure in place of the methods recognized by the common law. The result of the provisions is to afford to the heir or distributee the option of contesting the alleged will either in the Probate Court before it has been proved in that court, or in the Chancery Court after formal probate in the Probate Court. The result of a contest in either case is a judgment binding on the parties to the contest. As to them the matter becomes *res judicata*. The procedure and the result of it are substantially the same whether the one court or the other is resorted to. After the admission of the instrument to probate in the Probate Court, an heir or distributee who did not contest in that court may contest by bill in Chancery just as if nothing had been done by the Probate Court. Though he had the statutory notice of the application for probate in the Probate Court, the judgment of that court admitting the instrument to probate is not *res judicata* as against him. It is well settled by the Alabama decision that a proceeding *in rem*, and that it never becomes in form or in fact a suit between adverse parties, unless there is a contest, and then only between the party alleging the existence of the will and the contestant. *Knox* v. *Paull*, 95 Ala., 505; *Kumpe* v. *Coons*, 63 Ala., 455; *Allen* v. *Prater*, 35 Ala., 169.

An heir at law, who has received the statutory notice of the application to probate, unless he appears and con-

tests the application, is not a party to the proceeding, and cannot appeal from the order or judgment made by the Probate Court therein. *Clemens* v. *Patterson*, 38 Ala., 721.

It plainly appears from the decisions just cited that by the institution of a contest the character of the proceeding is transformed from one *in rem* into a suit between adversary parties. It becomes a "suit" when a contest is instituted. The effect of the statutes as above stated has been repeatedly recognized by the Supreme Court of Alabama. See *Johnston* v. *Glasscock*, 2 Ala., 218; *Kumpe* v. *Coons*, 63 Ala., 448; *Lyons* v. *Campbell*, 88 Ala., 462; *Knox* v. *Paull*, 95 Ala., 505.

In the case first cited, *Johnston* v. *Glasscock*, 2 Ala., 218, after reviewing the methods of contesting wills prevailing under the common law, calling attention to the facts that under that system, as to personal estate, the will derived its potential force solely from the probate, without which an executor was unable to sustain an action, while as to real estate the probate was without effect, and the question of the existence of an alleged will of real estate was properly determinable in an action of ejectment, on an issue of *devisavit vel non*, the court said:

"From this statement of the law, as it existed unaffected by statutes, it will be seen that there were many and important distinctions between wills of real and personal estate both with respect to the manner by which they could be established and the mode by which they might be controverted. Our statute of 1806 seems to have intended to provide a common mode by which wills of either description may be established in the first instance."

The court further says, in reference to the statute, that it "also provides a new mode by which the heir at law, or the next of kin, can contest the will in such a manner that one suit will be conclusive and final;" and that "the

opportunity afforded by the statute to the heir at law and next of kin, or others concerned in the will, to contest it in Chancery after it has been admitted to probate in the county court seems to be given in place of the proof in solemn form, as previously practiced in the ecclesiastical courts, when the will was of personal property and of the action of ejectment when the will was of real estate." In the case of *Knox* v. *Paull*, 95 Ala., 505, it was decided that an heir at law who had not contested in the Probate Court could contest by bill in Chancery though he had been served with the statutory notice of the original application to probate, and the court in its opinion (p. 509) clearly recognizes that the contest is substantially the same proceeding whether instituted in the Probate Court before formal probate or afterwards by bill in Chancery. In either case the proceeding is the statutory substitute, where the will disposes of real estate, of the action of ejectment at common law. In other words, where the question of the validity of a contested will of real estate was determined in an action of ejectment at common law that question must now, under the Alabama Statutes, be disposed of on a contest either in the Probate Court or by bill in Chancery. The controversy between one claiming under an alleged will of real estate and an heir at law denying the validity of the instrument is the same thing now that it was when the common law was in force. The change worked by the Alabama Statute is in the form of the proceeding for the trial of the question. A suit which would have taken the form of an action of ejectment at common law, as the result of the Alabama Statute, takes the form of a contest either in the Probate Court or in the Chancery Court.

The will in this case, as shown by the averments of the petition for the removal of the cause (Record, p. 1),

disposed of real estate in Alabama of the value of more than ten thousand dollars. But for the Alabama Statutes above quoted the controversy on the subject between the heir at law and the devisee would have taken the form of an action of ejectment. The Circuit Court of the United States would have jurisdiction of such a suit if there was the requisite diversity of citizenship and value of the matter in controversy. That jurisdiction cannot be impaired by changing the form of the proceeding. The expression used in the judiciary acts "all suits of a civil nature, at common law or in equity," certainly includes an action of ejectment in which the question of the validity of a will of real estate is involved. If controversies of this nature are included in the grant of jurisdiction State legislation cannot impair this jurisdiction by merely changing the form of the proceeding. If a case is in its essence a suit at law State legislation cannot change its nature. *Smith* v. *Adams*, 130 U. S., 167; *Smyth* v. *Ames*, 169 U. S. 516; *In re Stutsman County*, 88 Fed. Rep., 337; *In re* Jarnecke Ditch, 69 Fed. Rep., 161.

In the last cited case the court said: "But the legislation of a state cannot by making special provisions for the trial of particular controversies, nor by declaring such controversies to be special proceedings and not civil suits at law or in equity, deprive the federal courts of jurisdiction, nor prevent a removal. A State legislature, if the constitution of the State does not forbid it, may provide for the trial of any cause in some special way unknown to the methods of procedure at law or in equity. But, whatever the method of procedure, it would be none the less a trial if conducted by a tribunal having power to determine questions of law and fact; and if the subject-matter constituted a controversy involving the legal or equitable rights of parties, it might be cognizable in the courts of the United States. Unless this were so, the only

thing the legislature of a state would have to do to entirely destroy the jurisdiction of the federal courts and the right of removal would be to abolish all suits at law and in equity, and substitute special statutory methods of procedure. Neither the legislature nor the courts of a State have the power, by giving new names to legal proceedings, to change their essential character. Courts will look beyond forms to the substance, and from it determine whether the controversy, in its essential nature, is a suit at law or in equity, as understood by the courts of the United States."

The present case being a controversy as to the valadity of a will of real estate, the issue being what was known to the common law as the issue *devisavit vel non*, the controversy, in its essential nature, is a suit at law, and the change in the method of procedure effected by the Alabama Statute could not change the nature of the suit so as to put it beyond the reach of the jurisdiction of the federal court. It is submitted that there is nothing in the nature of the suit to keep it out of the United States Court.

The question of the right to remove to the federal court such a proceeding for the contest of a will as that provided by the Alabama Statute has been several times passed upon by the Circuit Courts of the United States.

There is some apparent conflict in the rulings of the different courts on the subject. The right to remove such a proceeding is clearly established by rulings of the Circuit Court for the Northern District of Georgia, of the Circuit Court for the Eastern District of Arkansas, and of the Circuit Court of Appeals for the Ninth Circuit. *Brodhead* v. *Shoemaker*, 44 Fed. Rep., 518; *Franz* v. *Wahl*, 81 Fed. Rep., 9; *Richardson* v. *Green*, 61 Fed. Rep., 423. On the other hand, the right to remove contests of the

probate of wills has been denied, as in the cases of *In re Cilley*, 58 Fed. Rep., 977; *Reed* v. *Reed*, 31 Fed. Rep., 49; and *In re Aspinwall's Estate*, 83 Fed. Rep., 851. In the cases in which the right of removal has been denied the proceeding was merely one to probate a will, being purely *in rem*, and not resulting in a judgment binding upon parties, or the court was misled by the mere form of the original proceeding, and did not give due weight to the circumstance that though the proceeding started as a proceeding *in rem* for the probate of a will it had been transformed into a suit *inter partes* by the institution of a contest. In the case of *Franz* v. *Wahl*, 81 Fed. Rep., 9, the court said, in disposing of the question: "Is the proceeding to probate a will a case at law or in equity which is removable under the federal statutes": "It would seem only necessary to recur to well established fundamental principles in order to reach a proper conclusion. In the first place, the question of the validity of the will was one of which courts at law had jurisdiction by proceeding to try the ~~devisavit~~ *devisavit vel non* at the time the federal system of judiciary was established. It was therefore a case at law, within the meaning of the federal statutes; and, where the necessary conditions of adverse citizenship and local prejudice existed, it was a proceeding properly cognizable in a court of the United States, either upon suit brought there, or properly removed to it. That proceeding has been abolished by the Arkansas Statutes, and now the only way to contest a will is by objection to its probate in the probate court, or by appeal from the order of the probate court to the Circuit Court. If this proceeding cannot be removed to the federal courts, then the right to contest a will in the federal courts at all is taken away by the Arkansas practice acts. This cannot be done. State legislation cannot curtail, by chang-

ing rules of practice or laws regulating the jurisdiction of the courts, the jurisdiction of federal courts." In the case of *Brodhead* v. *Shoemaker, supra*, it was decided by Judge Pardee that a proceeding under the provisions of the Georgia Code for probating a will in solemn form by a proceeding *inter partes*, which is conclusive against those contesting the will, is a suit within the meaning of the removal statutes. It appears from the opinion in the case of *Richardson* v. *Green, supra*, that under the laws of Oregon the validity of a will could not be contested in the proceedings to probate it, which are purely *ex parte*; but such contest must be made the subject of a direct attack upon the will in a formal suit *inter partes*; and the court decided, Justice McKenna, then Circuit Judge, concurring, that this latter proceeding, being a suit between parties, is one of which the United States Circuit Court may take jurisdiction, where the amount in controversy is sufficient, and the parties are citizens of different states. A difference between the Oregon law which was under review in this case and the Alabama law is that, though the proceeding for the probate of a will in the Probate Court in Alabama is when instituted an *ex parte* proceeding *in rem*, as under the Oregon Statute, and cannot be made a suit between parties by any act of the proponent; but in Alabama, before the probate, it may become in form and in fact a suit *inter partes* by the filing of a contest by an heir at law or distributee. *Kumpe* v. *Coons*, 63 Ala., 445; *Knox* v. *Paull*, 95 Ala., 507.

While this court has not had occasion to pass upon the question of the jurisdiction of the federal courts of a contest of a will before its probate, yet the principles which are applicable in determining the question are stated in several cases. In *Ormsby* v. *Webb*, 134 U. S., 47, the proceeding commenced as an application to probate a

will. The objection was made in this court that the final judgment of the Supreme Court of the District of Columbia, affirming an order of the same court, in special term, admitting a will to probate and record, was not a final judgment within the meaning of the statutes authorizing a review by this court of final judgments of the Supreme Court of the District of Columbia "in any case" involving a specified amount. Mr. Justice Harlan, delivering the opinion of the court said:

"So that the only question is whether the issues framed by the Supreme Court of the District, and which involve an inquiry as to whether the decedent was or was not incompetent, from unsoundness of mind or because of undue influence exerted upon him, to make a will—issues to which there are adversary parties—constitutes a "case" within the meaning of the Act of Congress defining the jurisdiction of the court over the final judgments and decrees of the court below. If it does not then it would follow that a proceeding in the Supreme Court of the District to revoke the probate of a will is a 'case' the final judgment in which, as held in *Carter* v. *Cutting*, may be re-examined by this court, when the value of the matter in dispute is sufficient, while a proceeding in the same court, involving the validity, as a last will and testament, of an instrument offered for probate, and thereof its admission to probate, is not a 'case,' the final judgment in which can be here reviewed. We cannot assent to this view. The latter proceeding is as much a 'case' as the former. One involves the validity of the probate of a will, the other the validity as a will of a paper offered for probate. Upon the determination of each depend rights of property, and in each are adversary parties. There can be no reason why Congress should extend the jurisdiction of this court to proceedings involving the validity of the probate of wills, and not to proceedings involving the validity of an instrument offered for probate as a will."

This ruling supports the proposition that where a controversy as to the validity of an alleged will is litigated between adversary parties in a court of justice in a manner provided by law, the contest is a "case" or "suit," though it arose in a proceeding which started out as a proceeding *in rem* for the probate of a will.

In *Upshur County* v. *Rich*, 135 U. S. 467, the court said:

"Although the granting of a probate of a will is not ordinarily a suit, yet, if a contestation arises, and is carried on between parties litigating with each other, the proceeding then becomes a suit."

In *Ellis* v. *Davis*, 109 U. S. 485, the decision was that a bill in equity to set aside a will could not be sustained, because the remedy at law under the Louisiana procedure was plain and adequate; but, in its discussion of the equitable jurisdiction of the United States courts in controversies involving the validity of wills, the court recognizes the fact that contests under provisions of State law, though arising in a probate proceeding, may well be suits of which the United States courts could acquire jurisdiction. The court said:

"Jurisdiction as to wills and their probate as such, is neither included in nor excepted out of the grant of judicial power to the courts of the United States. So far as it is *ex parte* and merely administrative, it is not conferred, and it cannot be exercised by them at all until, in a case at law or in equity, its exercise becomes necessary to settle a controversy of which a court of the United States may take cognizance by reason of the citizenship of the parties. It has been often decided by this court that the terms 'law' and 'equity,' as used in the Constitution, although intended to mark and fix the distinction between the two systems of jurisprudence as known and practiced at the time of its adoption, do not restrict the

jurisdiction conferred by it to the very rights and remedies then recognized and employed, but embrace as well, not only rights newly created by statutes of the States, * * * but new forms of remedies to be administered in the courts of the United States, according to the nature of the case, so as to save to suitors the right of trial by jury in cases to which they are entitled to it, according to the course and analogy of the common law."

It is not contended that a mere probate proceeding, which has not assumed the form and is not in fact a suit between adversary parties, could be removed into the United States Court. As said in *Gaines* v. *Fuentes*, 92 U. S. 10, referring to the ruling on the subject in *Broderick's Will*, 21 Wall., 504, "the reason lies in the nature of the proceeding as one *in rem*, which does not necessarily involve any controversy between parties; indeed, in the majority of instances, no such controversy exists." The United States Courts "have no machinery for registering a will, issuing letters, and directing and supervising administration." *Hargrove* v. *Redd*, 43 Ga. 142, 150.

To prove a will in simple form no suit is required. No written petition is necessary. *Small* v. *McCalley*, 51 Ala., 527. In this case the will is probated so far as the proceeding is *ex parte*. The affidavit of the surviving witness, reduced to writing and signed by him (Pr. Rec., 37), is all that can be done as an *ex parte* probate. The fact that the Probate Judge did not order the will to be recorded does not affect the fact that it is proved *ex parte* or in common form. The provision as to recording is merely directory. *Reese* v. *Nolen*, 99 Ala., 206. Until the contest was filed there was no suit in any sense. The contest was a direct proceeding to invalidate the will. It is a statutory suit to contest the will. It is a "civil ac-

tion." 16 Ency. of Pleading and Practice, pp. 995, note, 1008.

Applying to the Probate Court to receive the proof of an alleged will and to admit it to record is no more a suit of which the United States Courts could acquire jurisdiction than is an application to the same court to receive a deed or mortgage and spread it upon the public records. It is no part of the functions of the United States courts to perform such purely administrative duties. Their jurisdiction does not extend to such *ex parte* administrative proceedings. But certainly, when, by the institution of a contest, a controversy is presented in reference to the alleged will, which must be litigated between parties, and result in a judgment binding upon them, it cannot be said that the contest is not a suit merely because the subject matter of it, the alleged will, made its appearance in court in an *ex parte* application for its probate.

By the institution of the contest, the contestant's claim took such form that the judicial power was capable of acting upon it, and became the case of controversy of which the United States Court could acquire jurisdiction. *Smith* v. *Adams*, 130 U. S., 174; *Osborne* v. *Bank of U. S.*, 9 Wheat., 738; *West* v. *Aurora City*, 6 Wall., 139; *Boom Company* v. *Patterson*, 98 U. S., 407; *Hess* v. *Reynolds*, 113 U. S., 73.

The removal of the contest to the United States Court for trial there does not have the effect of imposing upon that court the functions of a court of probate or for the administration of estates. The litigated question as to the validity of the alleged will is determined there, just as it is in another state court when there has been a change of *venue* from the Probate Court, as authorized by the state statute. Code of Ala., 1896, secs. 4295, 4296. When there is such change of *venue* the court to which the

trial of the contest is removed does not perform the function of admitting the instrument to probate, but its judgment on the contest is certified to the probate court from which the trial was removed *; "and the will must be probated or rejected in such probate court as such judgment may be for or against the validity of the will." Code of Ala., 1896, sec., 4296. Where the trial is in the Chancery Court, that court does not become a court of probate. The court in which a trial of the contest is had, renders a judgment binding upon the parties as to the issues involved in the contest. The administrative function of admitting the instrument to probate is performed at the place where the state law requires it to be spread upon the public records, though the litigated case involved in a contest of the will may be tried in another forum.

IV. The Case was Removed into the Federal Court by a "Defendant being such Citizen of another State."

Conceding that the action of the lower court in ruling on the motion to remand is properly presented for review by this court that ruling was correct and must be sustained.

The objection that the defendant in error was not a "defendant" is not well taken. Certainly, he was a "defendant" within the reason of the rule restricting the right of removal to defendants. This discrimination was evidently based on the considerations that the plaintiff, having the selection of tribunals, would not voluntarily bring his suit in a court in which he could not expect to obtain justice, and that any local prejudice or influence would be in his favor, and against a non-resident sued by him in a State court; so that the prejudicial influence to be guarded against is likely to be in favor of the party

invoking the jurisdiction of the court and against the party whose presence in court is the result of the necessity of his appearing to defend his interests there assailed. "It was originally supposed that adequate protection against such influences was secured by allowing to the plaintiff an election of courts before suit; and, when the suit was brought in a State court, a like election to the defendant afterwards." *Gaines* v. *Fuentes*, 92 U. S., 10; *Waco Hardware Co.* v. *Michigan Stove Co.*, 91 Fed. Rep., 289; Dillon on Rem. of Causes, (Black's Ed.) Sec. 65. The contestant was certainly the plaintiff in the sense that she took the step, by filing her contest, by which the question of the validity of the will became a matter of controversy to be litigated in a proceeding which would result in a judgment binding upon all persons claiming under the will.

There was no controversy until the contest was inaugurated. The proceeding would have been merely one *in rem* unless, by the filing of the contest, it had been transformed into a suit between adversary parties. The filing of the contest was the institution of the suit. *Knox* v. *Paull*, 95 Ala., 507; *Allen* v. *Prater*, 35 Ala., 169. The contestant had the selection of the forum. It was not necessary for her to contest in the Probate Court. If the will had been admitted to probate there, without any contest having been made by Mrs. McDonnell, she could still have contested by bill in Chancery. The only issues that could be tried in either court were the issues presented by the contestant. She was the plaintiff in the sense that she brought the case into court, and by her pleading presented the only questions upon which issue could be taken. It is generally recognized that the institution of a contest of a will under statutory provisions is the bringing of a civil action, and that the contestant is the

plaintiff. 16 Ency. of Pleading and Practice, pp. 995, 1008. That a contestant really occupies the position of a plaintiff is well shown by the ruling in the case of *Barksdale* v. *Davis*, 114 Ala., 623. That case was a contest of a will by bill in Chancery. Among other grounds of contest alleged in the bill were the following:

"(C.) That the execution of said will was obtained by undue influence on the part of Amanda Barksdale, one of the devisees in said alleged will. (D.) That the execution of said will was procured by fraud on the part of said Amanda Barksdale. (E.) That the execution of said will was procured by undue influence by said Martha Barksdale, one of the devisees of said alleged will. (F.) That the execution of said will was procured by fraud by the said Martha Barksdale."

Demurrers were interposed to the bill on the ground that it did not state facts constituting fraud and undue influence. In disposing of these demurrers the court said:

"Grounds C, D, E and F charge in general terms, first, that the will was procured by undue influence by Amanda Barksdale, one of the devisees under the alleged will, and next by fraud on the part of said Amanda. Neither the particular undue influence and fraud, nor how the same were exerted, are stated.

"It is conceded that, according to the general rules of equity pleading, in other cases, these averments are not sufficiently specific; but it is contended that, on the contest of a will the entire laboring oar is upon him who asserts the validity of the will, and the contestant need do no more than to allege generally its invalidity. Our old cases of *Johnson* v. *Glasscock*, 2 Ala., 218, and *Johnson* v. *Hainsworth*, 6 Ala., 443, are to be relied upon to support the contention. These cases hold that, under the statutes then

existing, the complainant need only allege the facts showing such relationship, on his part, to the deceased as entitles him to contest the supposed will, with a prayer for relief. At that time, there was no statute prescribing the allegations, written or otherwise, necessary to be made in order to inaugurate and try the validity of a will. The methods of procedure were under the control of the court. Pursuing the principle that the burden was upon him who set up the validity of the instrument as the will of the alleged testator, it was held, as above stated, the contestant was required to allege nothing more than his interest entitling him to contest.

"Article 111, Title 4, Part 2 of the present Code is devoted to the subject of contesting the validity of wills. The first section of this article (1989) provides that, 'A will, before the probate thereof, may be contested by any person interested therein, or by any person who, if the testator had died intestate, would have been an heir or distributee of his estate, by filing in the court where it is offered for probate allegations in writing that the will was not duly executed, or of the unsoundness of mind of the testator, or of any other valid objections thereto; and thereupon an issue must be made up, under the direction of the court, between the person making the application as plaintiff, and the person contesting the validity of the will, as defendant; and such issue must, on application of either party, be tried by a jury.' Then follow provisions for the trial and the rendition of judgment in the probate court, following which, in the same article, is section 2000, under which this bill is filed, providing that, 'Any person interested in any will, who has not contested the same under the provisions of this article, may, at any time within five years after the admission of such will to probate in this State, contest the validity of the same by bill in Chancery, in the district in which such will

was probated, or in the district in which a material defendant resided."

"*It is manifest that these provisions were introduced to change the policy of the law obtaining prior to their adoption, by requiring the contestant, by written procedure, to set forth the grounds upon which he expects to contest the validity of the proposed will, and to confine the trial, after proof of the due execution of the will, to the issues which his allegations tender. The purpose of the change was that which underlies the law of pleading generally, that the parties may be certainly advised of the issues to be tried, and the court enabled to proceed intelligently in adjudicating their rights.*"

In subservience of this general rule, it is a familiar principle of equity pleading that the complainant must distinctly allege the facts upon which he relies for relief. Mere general statements or conclusions will not suffice. Thus, if fraud be relied upon, the general charge that fraud was committed is, of course, not sufficient but the particular facts constituting the fraud must be stated; otherwise the opposite party would be practically without information of what he was called upon to defend.

"Upon a contest of a will, when fraud or undue influence is relied upon, the burden is upon the contestant to prove it. The opposite party is only required to prove the due execution of the will, according to the statute. It is as essential, therefore, that such party be informed, by distinct averments, of the facts constituting the fraud or undue influence so as to be prepared to meet them, as that such information be so given to any party, in any judicial proceeding; hence, there can be no well founded reason for holding that the legislature intended, when it required that the contest be in writing and set forth the grounds relied on, that only a general statement of such grounds, conveying to the opposite party, practically, no

information of value to him in the preparation of his cause, should be sufficient. If such was the legislative intent, the change in the law scarcely served a useful purpose.

"We are of opinion that the bill should set forth the facts constituting the fraud or undue influence charged."

This ruling shows that the Alabama Court clearly recognizes that the contest is the statement of a cause of action in favor of the contestant, making the contestee a defendant. *Walcott* v. *Watson*, 46 Fed., Rep., 529.

The word "defendant" as used in the Removal Act under consideration is used as a general term, and is employed with reference to any proceeding that is "a suit in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State." Such suits, as has been shown, may comprise many proceedings the parties to which are not designated by the State laws "plaintiffs" and "defendants." And so, having regard to the legislative purpose and the object in view in conferring the right of removal upon defendants, to prevent a party from voluntarily bringing an action in a State court and then capriciously removing it, it is submitted that the word "defendant" is to be taken in its enlarged sense as meaning, not merely one who in the legal phraseology of local statutes is called the defendant, but the person who in any civil proceeding is the party against whom any legal action is taken or directed, or whose interest in the matter in controversy is such as to require him to come in and resist a proceeding which could result in depriving him of all right and title to property.

The circumstance that the statute provides for making up the issues in a contest in the Probate Court "between

the person making the application, as plaintiff, and the person contesting the validity of the will, as defendant", is entitled to no weight in determining who is plaintiff and who is defendant within the meaning of the removal act. The contestant is plaintiff because she selects the court and presents the questions to be tried. What she does is the institution of a statutory suit to contest the will. 16 Ency. of Pleading and Practice, p. 1008. The contestee is a defendant because he is brought into court against his will by the necessity of defending his right under the will, and his involuntary presence there subjects him to the local prejudice and influence protection against which is the object of the statute.

The arbitrary action of the State Court in declining to recognize the defendant in error as a defendant to the contest, and in striking from the file his petition and answer did not affect his right to defend his title necessarily involved by the institution of the contest, and to remove the contest. Any one interested in a will has the right to have himself made a party to the proceeding at any time before the rendition of a judgment on the application to probate, and even after judgment, for the purpose of appealing. *Clemens* v. *Patterson*, 38 Ala., 721, 724; *Lees* v. *Browning*, 15 Ala., 494; 16 Ency. of Pleading and practice, 1017. When one has done all that he could to become a party, and has been wrongfully refused the right by the State Court, he is a party sufficient for the purpose of removing the case, if otherwise he has the right to remove the case. *Snow* v. *Texas Trunk Railroad*, 16 Fed. Rep., 1; *Hack* v. *Chicago & S. G. Ry. Co.*, 23 Fed. Rep., 356; 20 Am. & Eng. Ency. of Law, 989 and cases cited. By filing his petition and answer he secured a standing in the case from which he could not be lawfully removed without his consent. *American*

Nat. Bank v. *National Benefit & Casualty Co.*, 70 Fed. Rep., 420, 422.

V. The application to remove was made in proper time.

The plaintiff in error is guilty of the inconsistency of objecting to the removal on the ground that it was made too soon, before the defendant in error had acquired any standing in the case, and then objecting that the application to remove came too late. There is nothing in the record to indicate that the pendency of the proceeding was brought to the notice of Llewellyn Jordan, the principal beneficiary under the will, until the original proponent asked to have him made a party to the proceeding, so that he could defend his interests against the contest which had been instituted. He at once intervened and answered the contest. He applied for a removal of the case to the United States Court at the earliest possible moment.

The rule is that a removal is never too late when the application is made as soon as the proceeding assumes the shape of a removable cause in the court in which it originated.

Powers v. *Chesapeake & Ohio Ry., 169 U. S., 101.*
Speckart v. *German Nat. Bank, 85 Fed. Rep., 12.*
Burdick v. *Peterson, 6 Fed. Rep., 840.*
20 *Am. & Eng. Ency. of Law*, 990, note 3.
Hack v. *Chicago, G. S. Ry. Co., 23 Fed. Rep., 356.*
Frank v. *Railroad Co., 16 Fed. Rep., 1.*

After the time for removal is out if the complaint is amended so as to create a new cause of action, the case may then be removed.

Bailey v. *Mosher*, 95 Fed. Rep., 223.
Molton v. *Reynolds*, 62 Fed. Rep., 417.

The same principle would authorize a removal when a new party appears, whose presence then for the first time injects into the case the features which gives the right of removal.

VI. The Defendant in Error being the sole party having an Interest adverse to the Plaintiff in Error his right to remove was not affected by the Presence of a Merely Nominal Party.

W. E. Jordan, who originally filed the will for probate, was a mere nominal party. He had renounced any right to letters testamentary under the will before the application for removal was made. (Pr. Rec., p. 38.) The defendant in error was the sole beneficiary under the will, W. E. Jordan having no real interest in the controversy his citizenship did not affect the jurisdiction. *Removal cases*, 100 U. S., 457; *Barney* v. *Latham*, 103 U. S., 205; 1 Desty's Federal Procedure (9th Ed.), p. 457. But even if W. E. Jordan could be considered as a material party, the controversy between Ada F. McDonnell, the only heir, a citizen of Alabama, and Llewellyn Jordan, sole devisee under the will, a citizen of Mississippi could be removed by the latter on the ground of prejudice or local influence under the statute authorizing such removal by "any defendant," &c. *Whelan* v. *New York, &c., R. R. Co.*, 35 Fed. Rep., 849; *Bonner* v. *Mickle*, 77 Fed. Rep., 495; *Jackson & Co.* v. *Pearson*, 60 Fed. Rep., 125.

Respectfully submitted,

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No. 253.

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No. 253.

ADA F. McDONNELL, PLAINTIFF IN ERROR,

vs.

LLEWELLYN JORDAN, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

RICHARD W. WALKER,
Counsel for Defendant in Error.

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Par. 1. That the contestant really occupies the position of plaintiff is shown in the rulings in several cases not cited in the original brief. The *contestant* in Alabama is called the *caveator* in other States.

"It appears to us to be perfectly clear that in this case, thus situated, the caveators are to be regarded as the assailants of the will, as the actors who originated this proceeding, and who are therefore entitled to be placed upon the record in the attitude of plaintiffs. In the case now before us, the appellant was undoubtedly the *assailant* of the

paper as a will, and the *actor* who originated this proceeding, namely, the framing of issues to try its validity as a testamentary paper."

Edelin *vs.* Edelin, 6 Md., 293.

In the case of *Emmons vs. Garnett*, 18 D. C. Rep., 59, which was a will contest, the court said:

"The remaining objection is to the order of the Orphan's Court assigning who should stand upon the record as plaintiff and who as defendant. We think the Orphan's Court was in error in passing that order, because it belongs entirely to the circuit court, where the issues are to be tried, to determine who shall be plaintiff and who shall be defendant on the record. It is the uniform practice in the State of Maryland, from which we derive our probate system, in a trial of issues from the Orphan's Court before the circuit court, to make the caveator plaintiff on the record and the caveatee the defendant. That is the act of the Circuit Court, not the act of the Orphan's Court.

"A case in which the question was determined definitively and set at rest by the Court of Appeals of Maryland, was the case of Stocksdale *vs.* Cullinson, 35 Maryland, 322, where the court said that it was the uniform practice in the State of Maryland to make the caveator the plaintiff and the caveatee the defendant, no matter what the issue was. This is in entire analogy to the practice of the courts of law in the trial of issues. It does not make any difference who has the affirmative of any issue in a court of law as to the privilege of opening and closing before the jury. A familiar instance is where there is a plea in confession and avoidance. Now, although the defendant has the affirmative upon himself to sustain his plea of confession and avoidance, nevertheless the plaintiff opens and closes the case before the jury. We must not confound the opening and concluding before the jury with the opening and concluding in assuming and discharging the burden of proof before the court and jury. The plaintiff, where there is a plea in confession and avoidance, simply opens his case by stating it before the jury, and then the defendant brings in his affirmative proof, and the burden is upon him all the way, in such a case, to maintain his plea. Nevertheless, though the burden be upon him throughout, so far

as the proof is concerned, the privilege remains with the counsel for the plaintiff to open and conclude the argument before the jury, and so with regard to the case of caveator and caveatee."

In California, where the contest is substantially the same proceeding as the contest in Alabama, it is well settled that the contestant is the plaintiff and the petitioner or proponent is the defendant.

Estate of Dalrymple, 67 Cal., 444.

In the case of *Moore vs. Heincke* (Ala.), 24 So. Rep., 377, the Supreme Court of Alabama followed, in reference to a contest in the Probate Court, the ruling made in *Barksdale vs. Davis*, 114 Ala., 623, and held that the statement of the grounds of contest determined the issues in the case. This shows that as to the pleading in the case, the contestant occupies the position of plaintiff. It is very plain that a person who presents a will for probate does not by that act put himself in the position of the plaintiff in a suit. His petition is not supposed to present any issue. In fact *no written petition is necessary.*

Small vs. McCalley, 51 Ala., 527.

Under the Alabama law, as under the Maryland law above referred to, the contestant is the assailant of the will, he is the actor who originated the proceeding, he is the person whose pleading places before the court the only questions which can be tried, he is the one who is pursuing a remedy, he is the one who seeks the judgment of the court that a certain paper is a nullity, and he is manifestly and confessedly a plaintiff if he contests in the Chancery Court. Can it possibly be said that he is not really the plaintiff if he brings his suit in the Probate Court, merely because in the framing of the issues in that court a statute calls him plaintiff? It would lead to manifest absurdity to give to that statutory regulation controlling effect in determining who

is plaintiff and who is defendant in the proceeding. The result would be that in Maryland or in California a person claiming under a will could remove a contest to the Federal court because the state statute or practice denominated him a defendant, but that in Alabama a person occupying exactly the same position in a proceeding exactly similar in form and in substance could not remove it to the Federal court because the Alabama statute called him a plaintiff. This would amount to saying that a party's right to removal depends upon what a state statute calls him.

Par. 2. It is assumed in the brief for the Plaintiff in Error, on the motion of the Defendant in Error to dismiss or affirm, that it was in the power of the judge to hold the case open, and to enter judgment or make orders at some other place than that fixed by law for holding the court, at such time as might suit him; and that the making of the certificate of questions of jurisdiction at Birmingham was an exercise of this power. There is nothing to indicate that the judge undertook to hold the case open while the court was in session for any future action on it at some other place, and no attempt is made to show by the record that the certificate signed by Judge Bruce was made while he was holding court at Huntsville. His statement at the end of the certificate shows that this was done at Birmingham,—outside of the Northern Division of the Northern District of Alabama. Reference is made to the fact that judges of the United States courts frequently hear and decide cases at places other than those fixed by law for holding the court. That this is true is notorious. How this happens is well illustrated by the recent case of *Continental Trust Co. vs. Toledo, St. L. & K. C. R. Co.*, 99 Fed. Rep., 171, 174. The validity of such action depends upon the consent or acquiescence of the parties. There was no such consent or acquiescence in reference to the certificate in this case. This being so, the act of the judge in making the certificate at a place other than that fixed by the law as the place for holding the

court cannot be treated as a certificate by the court. In addition to the authorities cited in the brief heretofore filed in support of this proposition, attention is called to the legal definition of the word "court" given by the Century Dictionary:

"In law, a tribunal duly constituted and present at a time and place fixed pursuant to law, for the judicial investigation and determination of controversies. The court is not the judge or judges as individuals, but only when at the proper time and place they exercise judicial powers."

Par. 3. In the brief filed by Counsel for Plaintiff in Error on the motion to dismiss or affirm it is contended that the motion to remand, which is copied in the transcript, though not brought up in a bill of exceptions, is a part of the record, and that no bill of exceptions was necessary to show to the appellate court such motions and the rulings of the lower court thereon. This contention cannot be sustained. A motion to remand is not a part of the *record* as described by this court in the case of *Clune vs. United States*, 159 U. S., 590. It is not included in "the pleadings, the process, the verdict, and the judgment;" and it is not a matter which by any "statutory or recognized method has been made a part of it." The rule against appellate courts considering motions and rulings thereon not made a part of the record by bill of exceptions is not confined to motions not based upon matters not disclosed by the record. Mr. Freeman (1 Freeman on Judgments, 4th Ed., sec. 79) includes "all motions" among the matters which are not (unless made so by bill of exceptions, by consent, or by order of court) matters of record. The motions which the court declined to consider in the case of *Stern vs. Collier*, 101 Ala., 424, because they were not made a part of the record by bill of exceptions, were motions based exclusively upon matters disclosed by the judgment itself. In the case of *Wiggins vs. Witherington*, 96 Ala., 535, the rule was applied to a

motion in arrest of judgment, and to a motion to amend a judgment entry *nunc pro tunc*, this latter motion being one which must be founded upon matter appearing of record. The case of *Powell vs. Henry*, 96 Ala., 412, was referred to by counsel for Plaintiff in Error. The motion which the court held in that case should have been shown in the record and not in the bill of exceptions was a motion to strike from the file a demurrer, the court deciding that this motion was a part of the pleadings in the case. Of course, the record and not the bill of exceptions, is the place for the pleadings. But a motion to remand is no part of the pleadings. It is not one of the steps leading to the judgment in the case. It is not a paper necessary to support the judgment. Such a motion may be based upon matter resting in parol, upon mere matters of procedure, upon objections that may be waived. It need not be in writing. The motion itself is not necessary if jurisdiction is not shown. Furthermore, the motion copied in the transcript in this case does not rest solely upon matters disclosed by the record. It undertook to present an issue of fact as to the existence of prejudice and local influence, and some of the objections to the removal referred to matters of mere procedure, as the time when the application was made,—a matter which a party could waive. Certainly such objections are not presented to this court for review when not reserved by a bill of exceptions. In the case of *England vs. Gebhardt*, 112 U. S., 502, this court decided that papers filed in the lower court on an application to remand do not belong to the record brought up by a writ of error unless made a part thereof by a bill of exceptions, and that such papers not so made a part of the record will not be considered by this court. The rule was also applied in that case to the memorandum or opinion of the judge embodying his ruling on the motion to remand. In the present case the ruling on the motion to remand is not shown by any minute entry by the clerk, but only by a memorandum of his ruling

signed by the judge, which does not belong to the record. In the case of *Railroad Co. vs. Koontz*, 104 U. S., 5, the court said (pp. 15, 16), speaking of a review of the overruling of a motion to remand: "If his motion is decided against him, he may save his point on the record, and after final judgment bring the case here for review, if the amount involved is sufficient for our jurisdiction." Taking an exception and preserving it by bill of exceptions is what the court must have referred to in speaking of saving the point on the record.

Par. 4. The cases cited by counsel for the Plaintiff in Error (see pages 4 and 5 of their brief on motion to dismiss or affirm) as stating and applying the rule that this court will, of its own motion, whether or not the question is raised by either party, search the record to ascertain if it discloses a case within the jurisdiction of the United States court, were all cases where the appeal or writ of error operated to remove the case into this court, for its review generally. This is not such a case. A case must in some proper way get to this court before any question that could be involved in it is presented to the court for its determination. The Plaintiff in Error has undertaken to bring her case directly to this court from the Circuit Court. The objection is made that the record does not disclose the kind of case which the statue permits a party to bring directly to this court; that the writ of error should be dismissed because it is merely an attempt to get a review by this court in a case in which the right to obtain such a revision is withheld by the statute now in force. To apply the rule laid down in the decisions above referred to to cases of review by this court of questions of jurisdiction under section 5 of the act "to establish Circuit Courts of Appeals," &c., would involve an utter disregard of the restrictions and limitations imposed by that section upon the right of a party to have such question reviewed by this

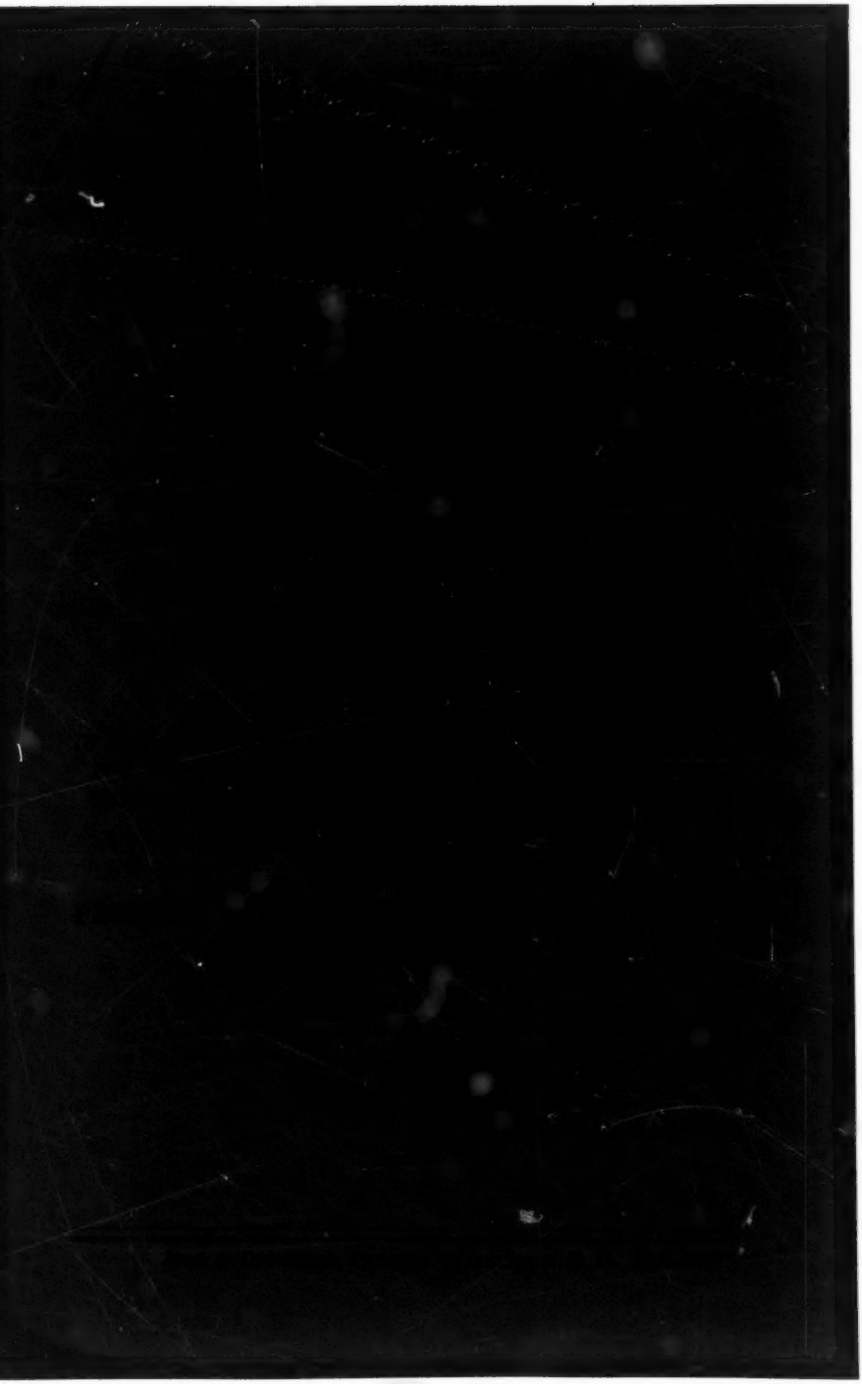
court. That statute establishes the rule that a party must go to the Court of Appeals for the review of judgments of the Circuit Court. The right to apply to this court to review such judgments is confined to certain classes of cases which are made exceptions to the rule. A party is not entitled to have such review by this court unless his case is brought within one of these exceptions. One of these exceptions is where the jurisdiction of the court is "in issue;" and "in such cases the question of jurisdiction alone shall be certified to the Supreme Court for decision." To come within this exception the jurisdiction must have been "in issue" in the court below, and this question of jurisdiction must be certified by that court. This excludes cases in which no question as to the jurisdiction was made in the lower court. The "record" must be looked to to ascertain if it discloses a case which the statute permits a party to bring here on a writ of error. The jurisdiction cannot be said to have been "in issue" unless the record shows that it was affirmed on the one side and denied on the other,—presented as a controverted point for the determination of the court. *Carey vs. Houston & T. C. R. Co.*, 150 U. S., 170. In providing that the jurisdiction shall be in issue and in requiring the lower court to certify the particular question raised and decided by it to this court, the statute discloses a manifest purpose to relieve this court of any duty of searching the record in such cases to find questions of jurisdiction not raised in the lower court, and to limit its duty in this regard to the decision of questions of jurisdiction duly raised in the lower court, which the record shows were decided by that court, and then certified to this court. If, notwithstanding the requirements that the jurisdiction must be in issue in the lower court, and that the question must be certified, a party may still remove the record into this court without showing a compliance with these conditions, and get the case dismissed from the United States court, under the rule that the record must show that the court

had jurisdiction, then the statute has failed to accomplish its manifest purpose of restricting the right of appeal and of limiting the duty of this court to the answering of specific questions certified to it. The effect would be to give the writ of error the effect of removing the case into this court, though the statute does not authorize the party to bring directly to this court such a case as his record discloses.

Par. 5. If the motions set out in the transcript are consdered as properly shown without a bill of exceptions, then the motion to strike from the files, which was made on the 3d day of September, 1897, (Printed Record, p. 10) before any motion to remand was made, was a recognition by the Contestant of the power of the United States court to make orders in the case, and was a waiver of the right to make a motion to remand not based upon a total want of jurisdiction in such a case. By thus asking the court to take judicial action in the case the Contestant waived any objections going merely to the time or manner of the case getting into the United States Court. (*Bridge Corporation vs. Lumber Co.*, 71 Fed. Rep., 225; *Baltimore, &c., R. Co. vs. Ford*, 35 Fed. Rep., 170; *Wyly vs. Richmond, &c., R. Co.*, 63 Fed. Rep., 487; 18 Ency. of Pleading & Pr., 370, 371.)

Respectfully submitted.

RICHARD W. WALKER,
Counsel for Defendant in Error.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 253.

ADA F. McDONNELL, PLAINTIFF IN ERROR,

vs.

LLEWELLYN JORDAN, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

PETITION OF DEFENDANT IN ERROR FOR A RE-HEARING.

To the Honorable the Justices of the Supreme Court of the United States:

The defendant in error, Llewellyn Jordan, respectfully presents this, his petition for a re-hearing and submits the following reasons why his prayer should be granted:

Par. 1. The Court in its opinion say that, "If Llewellyn Jordan had applied to be formally admitted as a co-propon-

ent, it must be assumed that he would have been permitted to become such of record, but he made no such application." It is respectfully submitted that this was in effect what the defendant in error endeavored to do. As soon as he was advised by the original proponent of the existence of the pending contest, as appears by the record on page 16, he endeavored to have himself made a party by the formal amendment of the original petition to probate said will. At the time that this application was made by the original proponent to have the defendant in error made a party to the contest proceeding all had been done that could have been done to prove the will in an *ex parte* proceeding. The will itself had been formally surrendered by the original proponent into the legal custody of the court and its due execution proven by the only surviving witness without conflict of testimony. This proved the will in common form. But it is not conceded that any written petition to probate said will was necessary. For indeed no such written petition is deemed necessary under the Alabama practice as will more fully appear in case of Small *vs.* McCalley, 51 Ala., 527. The court assumes from its examination of the record that your petitioner, the defendant in error, was permitting the will to be propounded, a contest to be initiated and carried on, a trial had and after a mistrial, with a full knowledge of all that was transpiring seek at that stage to intervene in the said contest proceeding and remove the case to the Federal court. It is respectfully submitted, as indeed it is admitted by counsel for the plaintiff in error, see page 11 of plaintiff in error's brief, that this petitioner, the defendant in error, so far as the record shows had no knowledge whatsoever of this contest over said will until the matter was brought to his notice through the application of the original proponent to amend his written petition then on file in the Probate Court. As soon as this knowledge came to your petitioner he endeavored, first, by the means of an amendment to the petition of the original proponent to make himself a party

in order that he might defend his interests against the contest which had been instituted and was then pending in said Probate Court. After three months of deliberation the Probate Judge for reasons, which do not appear, decided that the amendment to the petition proposed by the original proponent could not be made. This action of the Probate Judge was, in effect, a denial of the right which your petitioner had to make himself a party, under the Alabama statutes and decisions of the Supreme Court of that State, for the purpose of protecting and defending his rights, *he not then being represented by any one.* His presence was necessary and he was an indispensable party to a complete determination of the issues involved in said contest. "It is no part of the duty of executors to defend a will against a contest. That is left to the devisees or those interested in sustaining the will." This view was advanced by Mr. Chief Justice Waite, with whom Mr. Justice Harlan concurred in the case of McArthur *vs.* Scott, 113 U. S., p. 407. This position is sound, and it must be conceded that there is no escape from the conclusiveness of this doctrine. Therefore, Walter E. Jordan, a merely nominal party, a coexecutor simply, with no beneficial interest in the will, could not by his acts bind this petitioner without his knowledge and without his consent. It was the absolute right and bounden duty of this petitioner to become a party to the said contest proceeding as soon as he acquired notice thereof. There was no privity either in law, in blood, or in estate between the original proponent and your petitioner. Can it be said, therefore, that in the absence of any such privity of relationship, that a person of his own motion can offer a will for probate under the circumstances disclosed by this record, and without the knowledge and consent of your petitioner, employ counsel, and conduct proceedings which will bind your said petitioner as fully and completely as if he had been a willing party to such proceedings? I do not conceive that it was the intention of

this Honorable Court to so hold, but in effect its decision has that significance, and can have none other. Should this judgment of the court be carried into effect it would result in depriving this petitioner of any opportunity whatsoever of asserting his rights either in the Probate Court, he having been denied admission upon application and intervention to be made a party for the purpose of defending his rights, or in the Federal Court.

Par. 2. The Court in its opinion states that the presumptions are against your petitioner and that he was represented by his coexecutor to such an extent that when he took his place by intervention he was subject to all such disabilities as to the right of removal as then existed. This doctrine it would appear is in conflict with the decision of this court as expressed in the case of Powers *vs.* Chesapeake and Ohio R'y, 169 U. S., 101. Your petitioner states positively and unequivocally that his presence as a party to this contest proceeding was involuntary; that his presence was essential to a complete and final determination of the controversy; that he was a necessary party. That he did not come into the case as a substituted party or in the place of any rights which had been formerly asserted by the original proponent and that if the decision of the court in the case just cited is controlling, the rule is that a removal is never too late when the application is made as soon as the proceeding assumes the shape of a removable cause in the court in which it originated.

Par. 3. It is respectfuly submitted that an examination of this record shows a plain and unmistakable attempt on the part of the Probate Judge to defeat the rights of your petitioner, either in the said Probate Court or in the United States Circuit Court. When the answer and intervening petition of your petitioner was presented to the Probate Court it was accompanied by an affidavit of S. S. Pleasants, the only surviving witness to the said will, said affidavit having been taken before the said Probate Judge and duly

marked filed by him in his own person as of August 4, 1897. This affidavit was an exhibit to the intervening petition of your said petitioner duly filed in said Probate Court on August 4, 1897. With these facts before the Probate Judge can it be said that this intervening petition and answer with this accompanying affidavit were filed without his knowledge and without his consent? When this case was removed to the Federal Court upon August 12, 1897, there was no order appearing upon the minutes of the said Probate Court, nor so far as known, to counsel for the defendant in error, upon the intervening petition itself, striking said petition from the files of the Probate Court. It is plain from this record that this order so attached was an afterthought with the Probate Judge, and undoubtedly made for the purpose of preparing a transcript which would be favorable to the plaintiff in error. It is stated positively that no knowledge was brought to the attention of counsel for your petitioner as to the existence of any such order striking his petition and answer from the files of the Probate Court, until September 4, 1897, one day after the counsel for the plaintiff in error had filed a transcript of the proceedings in the Probate Court in the Federal Court and which was made as an exhibit to a motion to strike the petition of removal of your petitioner from the files of said Federal Court. Believing that a fraud had been practiced upon your petitioner and the court a writ of certiorari was sued out from the Federal Court and duly served upon the judge of the Probate Court to the end that he might certify the record of the said Probate Court as it existed upon the date of the removal of this cause of action from the State court. In the cases referred to by the court in its opinion as concluding the right to a removal after a trial had of the case in the State court, it is unquestionably true that in all of such cases the parties thus concluded were parties of record either in proper person or by authorized legal representatives in the proceedings in the State court. This was notably true in the case of Fisk *vs.*

Henarie, 142 U. S., 459, upon which the court bases its judgment that the application for removal in this case was made too late. As before stated your petitioner was not represented in the said case by any one in the Probate Court, nor was he permitted to become a party in his proper person for the purpose of defending his rights, and it would seem that the reasons adduced in the cases cited would fail in this case because the circumstances in this case are in no sense analogous to those shown in the cases cited. (See in this connection pages 29, 30, and 31 of brief of defendant in error on motion to dismiss or affirm.)

Par. 4. The attention of the court is respectfully called to the following language found upon page 11 of the brief of the plaintiff in error: "There is no law in Alabama, authorizing Llewellyn Jordan to be made a party to the probate proceeding. The question was presented to a Court of competent jurisdiction, and its adverse holding remains unreversed, and notwithstanding the fact that he was eliminated from the case, by this judgment of the Probate Court, he filed his petition in the Circuit Court of the United States, to remove a proceeding from the State court, *to which he was not a party.*" Again, on page 16 of said brief of plaintiff in error it is contended in the fourth place as follows: "At the time of the filing of the petition in this cause for removal to the Circuit Court of the United States, there was no controversy in the Probate Court of Madison County, Alabama, between a citizen of the State of Alabama, and a citizen of another State, which was necessary to give a Federal court jurisdiction." Admitting these contentions of the plaintiff in error to be true may it not be inquired what will be the nature of the proceeding upon the event of the remanding of this cause by the Federal court to the Probate Court by which your said petitioner may be able, if permitted so to do, to again reassert and defend any rights which he may have as sole legatee and devisee, and as named executor under the said will. Is it not fair to as-

sume that the Probate Judge having done all in his power to defeat the assertion of the rights of your petitioner in the said Probate Court and to defeat the jurisdiction of the Federal Court in the premises that he will continue so to do, and thereby deprive your said petitioner of having any day in court, which would in effect amount to an absolute denial of justice. The record of this case now on file in the United States Circuit Court of Appeals at New Orleans, upon a writ of error, sued out by the plaintiff in error, shows in the testimony of the leading counsel for the plaintiff in error the boldest and most striking evidences of a colossal fraud practiced upon the Federal Court which consisted in the effort to pack the jury-box with the friends, political associates and partisans of the husband of the said contestant, and of the leading counsel for the said plaintiff in error who has been and is now a candidate for election to the Congress of the United States. This testimony of the leading counsel shows that of two hundred and more names placed in the jury-box by the Democratic jury commissioner, that 192 of this number were the friends, political associates or partisans in this contest proceeding of the husband of the said contestant, or political supporters of the leading counsel for the contestant in his previous races for Congress and all resident in Madison Co., Alabama. Of twelve counties composing the Northern Division of the Northern District of Alabama only seven thereof contained names of persons which were placed in the jury-box by the said Democratic jury commissioner. It was found without exception that all of these names in these six counties represented in every case the political supporters of the leading counsel in his several races for Congress. These facts were presented to the Honorable John Bruce, United States District Judge at Montgomery, Alabama, and upon a due consideration thereof, he deemed it wise and prudent and in the interests of justice to remove the Democratic jury commissioner, to empty the jury-box of all names ille-

gally or improperly placed therein, to notify the jurors who had been thus illegally and irregularly summoned not to appear at court until further advised, and further the appointment of a new Democratic Jury Commissioner charged with the duty of filling in a legal and proper manner and in accordance with existing statutes the jury-box from which venires were to be drawn, to try this and other cases then pending in court. Not content with this attempt to defeat the ends of justice while this case was on trial in the Federal court, the original list of the jurors whose names had been improperly and illegally placed in the jury-box—and prepared by one George B. Vandeventer, *at that time, and now*, the clerk of the Probate Court of Madison County, Alabama, and as appears by the testimony in the Federal Court, was the amanuensis of the husband of the contestant during the trial of the issues of this case in the State court,—was stolen under the eyes of the court and in the presence of the jury while deliberating upon this case. This paper which was the most incriminating piece of evidence upon which to found an indictment and base a conviction of the jury-stockers was last seen at the trial table of the contestant at which were seated the leading counsel for the contestant, Hon. William Richardson, Associate Counsel Lawrence Cooper, who argued this case in this Honorable Court, the contestant, the husband of the contestant, and his brother. Every effort was made through the judicial machinery of the Federal court to discover the whereabouts of this missing paper, but up to the present time it has not been found, and doubtless has been destroyed. Must your petitioner, therefore, in view of all the circumstances surrounding this case, either as shown in this record now before this court, or in the record now on file in the United States Circuit Court of Appeals at New Orleans, be forced back into the Probate Court, where he was denied any standing whatsoever with these adverse political influences arrayed against him, and

with the clerk of that Probate Court as one of the parties concerned in this effort to pack the jury-box in the Federal Court? I cannot believe that this Honorable Court would permit, what in this case would amount to an absolute denial of justice by having this case remanded to the said Probate Court.

IN SUBSTANTIATION OF THESE STATEMENTS I HEREWITH SUBMIT THE ONLY PRINTED COPY NOW IN THE POSSESSION OF YOUR PETITIONER OF THE RECORD OF THE CASE NOW PENDING IN THE CIRCUIT COURT OF APPEALS AT NEW ORLEANS.

For these reasons, and in the interest of justice, the purity of the judiciary, and fair dealing, I most humbly petition this Honorable Court that the mandate in this case may be stayed and a rehearing granted, to the end that the case may be restored to the docket and a re-argument ordered before a full bench as to the questions involved, and if this application be denied, that the case be then considered as if resubmitted to the full bench on the briefs heretofore filed.

LLEWELLYN JORDAN.

The undersigned members of the bar of this Honorable Court, humbly conceive that it is proper that the writ of error herein should be reheard by this Honorable Court, if this Court should see fit so to order, and they, therefore, respectfully certify accordingly.

HEBER J. MAY,
R. W. WALKER,
Counsel for Petitioner.

McDONNELL *v.* JORDAN.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

No. 253. Argued April 19, 20, 1900.—Decided May 21, 1900.

The decision in *Fisk* v. *Henarie*, 142 U. S. 459, that the words in the act of March 3, 1887, 24 Stat. 552, with regard to the removal of causes from a state court, (as corrected by the act of August 13, 1888, c. 866,) "at any time before the trial thereof," used in regard to removals "from prejudice or local influence," were used by Congress with reference to the construction put by this court on similar language in the act of March 3, 1875, c. 137, 18 Stat. 470, and are to receive the same construction, which required the petition to be filed before or at the term at which the cause could first be tried, and before the trial thereof.

MATTIE Lee Fennell, a citizen of the county of Madison, State of Alabama, died on the fifth day of August, 1897, leaving a will executed by her December 17, 1895, in which she devised and bequeathed all her property, real, personal or mixed, to her mother, Mrs. M. E. Fennell, for life, and on her death to Llewellyn Jordan of the State of Mississippi. The will specifically provided that if the mother should die before the death of the testatrix, Llewellyn Jordan should take. Said Llewellyn Jordan and Walter E. Jordan, a citizen of Madison County, Alabama, were nominated and appointed executors of the will,

to act as such without bond. The mother died in 1896. February 9, 1897, Walter E. Jordan, one of the executors named, presented his petition to the Probate Court of Madison County, Alabama, together with the original will, to have said will admitted to probate. The petition stated that the sister of testatrix, Ada F. McDonnell, resident of Madison County, was her next of kin, and would have been her only heir had she died intestate; that Llewellyn Jordan was temporarily residing at Washington, D. C.; that the attesting witnesses resided at Huntsville, Alabama; and prayed that a date might be set for the hearing of the petition and due notice thereof be given as required by law to the next of kin of said deceased, and that such decrees, orders and other proceedings might be had and made in the premises as might be necessary to effect the due probate of said will according to law.

On the 11th day of February, 1897, Ada F. McDonnell, a sister, and only heir at law, of Mattie Lee Fennell, filed in the Probate Court her written contest of the alleged will, based on certain grounds therein set forth, and demanded a trial by jury. April 1, 1897, a jury was empanelled to try the contest, and an issue was then made up by the court between Walter E. Jordan, as plaintiff, and Ada F. McDonnell, as defendant, and the trial entered upon. On April 15, 1897, after having considered the case, the jury came into court and reported that they were unable to agree upon a verdict, whereupon the jury were discharged, and the case was continued.

May 28, 1897, Walter E. Jordan applied to the Probate Court to amend his petition by alleging: "That the said Llewellyn Jordan is the sole legatee and devisee under said will, and is the person really interested in defending the validity of said will and in answering and defending the contest filed in said court to annul and make invalid said will;" and to add to the prayer of his petition the following: "Petitioner prays that citation and all proper notice be given the said Llewellyn Jordan of this case and contest, and that he be made a party defendant to this petition."

The following order was entered thereon by the Probate Court, August 3, 1897: "In the matter of the petition of W. E.

Statement of the Case.

Jordan to make Llewellyn Jordan party defendant to this case, and that citation and all proper notice be given said Llewellyn Jordan as such, heretofore filed with the papers in this case, May 28th, 1897, was set for hearing this August 3rd, 1897. This day argued by Shelby and Walker for proponent and Richardson and Cooper for contestant. Motion overruled and amendment not allowed, and for reason good and satisfactory to this court the further hearing of this contest continued to Sept. 3rd, 1897."

On the 4th of August, Llewellyn Jordan, without leave, filed with the clerk of the Probate Court a paper styled an "answer," which commenced as follows: "In the matter of the contest of the probate of the will of Mattie Lee Fennell comes Llewellyn Jordan, named in the amendment to the petition in this cause filed by Walter E. Jordan, and intervenes in said proceeding and files this his answer to the contest of Ada F. McDonnell;" and on that day the Probate Court entered the following order: "In this cause a paper, purporting to be an intervention on behalf of Llewellyn Jordan, having been indorsed 'filed' by the clerk of this court, without the knowledge of the court, and said paper being so indorsed filed without an order authorizing said Llewellyn Jordan to intervene herein, and the motion made by Walter E. Jordan, the proponent, praying that said Llewellyn Jordan be made a party defendant hereto, on the 3rd day of August, 1897, being overruled and disallowed, it is therefore ordered that said paper purporting to be an intervention of said Llewellyn Jordan be stricken from the files in this cause."

August 5, 1897, Walter E. Jordan, the proponent of the will, filed in the Probate Court a renunciation of his right to have letters testamentary issued to him, and asked that the same be issued to Llewellyn Jordan, couched in these terms: "The undersigned, Walter E. Jordan, named in the will of Mattie Lee Fennell as one of her executors, renounces his right to have letters testamentary issued to him. He desires that the said will shall be probated, but that letters testamentary should issue alone to the co-executor named in said will, Llewellyn Jordan."

August 12, 1897, Llewellyn Jordan filed his petition in the

Circuit Court of the United States for the Northern Division of the Northern District of Alabama to remove to that court the matter of the proceedings to probate and to contest the will of Mattie Lee Fennell, then pending in the Probate Court, on the ground that from prejudice and local influence, he could not obtain justice in the Probate Court, or any other state court. The Circuit Court, on the same day, entered an *ex parte* order removing the cause from the Probate Court of Madison County, Alabama, to that court. Mrs. McDonnell made motions in the Circuit Court to remand the cause to the Probate Court, and to dismiss and strike from the files the petition of Llewellyn Jordan for the removal of the proceedings and cause from the state court.

Among the grounds assigned for the motion to remand were that the Circuit Court had no jurisdiction of a proceeding to probate a will; that Llewellyn Jordan was not a party defendant "in any suit, proceeding or controversy in the Probate Court of Madison County, Alabama, relating to the matter of the probate of the will of Mattie Lee Fennell, deceased," and the Circuit Court had no jurisdiction by virtue of the petition for removal; that the proceeding to establish the will was not a separate but a single controversy; that the application for removal was not made in time, or before the trial of the cause in the state court; and that the application for removal was made too late.

The Circuit Court maintained jurisdiction, and overruled each of the motions.

A trial was subsequently had in the Circuit Court, which directed a verdict in favor of Llewellyn Jordan, contestee. A verdict was returned accordingly, and thereupon the court, November 8, 1898, entered this judgment: "It is therefore considered by the court that the contest of Ada F. McDonnell of the last will and testament of Mattie Lee Fennell, deceased, and the several grounds of said contest be, and the same are hereby, overruled and denied. It is further considered and adjudged by the court that the contestee, Llewellyn Jordan, have and recover of the contestant, Ada F. McDonnell, the costs in this behalf expended, for which, if not otherwise paid, an execution may issue."

Statement of the Case.

Under the same date the court certified to this court the following questions of jurisdiction:

"1. Whether this court has jurisdiction to hear and determine the matters of controversy shown in the record between said Llewellyn Jordan and Ada F. McDonnell.

"2. Whether this court has jurisdiction to hear and determine the cause removed to this court from the state court, wherein it is sought to establish and probate the will of Mattie Lee Fennell, deceased, late a resident citizen of the county of Madison, State of Alabama.

"3. Whether this court has jurisdiction to remove the proceeding shown in the record from the state probate court upon the petition of the said Llewellyn Jordan.

"4. Whether this court acquired jurisdiction of the matters in controversy between the said Llewellyn Jordan and Ada F. McDonnell upon the petition of the said Llewellyn Jordan to remove the said proceedings from the state probate court to this court.

"5. Whether this court has jurisdiction to entertain the petition of the said Llewellyn Jordan for the removal of said proceeding to this court after the mistrial of said cause in the state probate court as shown by the record filed herein.

"6. Whether this court has jurisdiction to entertain the petition of said Llewellyn Jordan to remove said cause from the state probate court to this court after a jury had been empanelled in the state probate court, the trial entered upon, the failure of the jury to agree, and a mistrial of said cause entered in said probate court.

"7. Whether this court has jurisdiction of the petition of said Llewellyn Jordan to remove said cause from said probate court to this court after filing in said probate court an answer to the contest of said will."

A writ of error was applied for and allowed March 15, 1899, and the record showed an order on March 16 adjourning "the Circuit and District Courts of the United States for the Northern District and Northern Division" *sine die*. On the 4th of April, 1899, the judge of the Circuit Court entered on the certificate a statement that though it was dated November 8, 1898,

it was actually signed "on the 15th day of March, 1899, at Birmingham, Alabama."

Mr. Lawrence Cooper for plaintiff in error. *Mr. William Richardson* was on his brief.

Mr. Richard W. Walker for defendant in error. *Mr. Heber J. May* was on his brief.

Mr. Chief Justice Fuller, after stating the case as above, delivered the opinion of the court.

The question of jurisdiction was certified before the adjournment of the term of the Circuit Court of the United States for the Northern District and Northern Division of Alabama, at which term the judgment was entered, and we decline, under the circumstances disclosed, to discuss what the effect might have been if the certificate had shown on its face that it was in fact signed in the Southern Division of the District within which the presiding judge had jurisdiction.

Petitions for removal and motions to remand are matters of record proper. Ordinarily papers filed in support thereof are not so unless made part thereof by bill of exceptions, though sometimes this is otherwise. *England* v. *Gebhardt*, 112 U. S. 502; *Bronson* v. *Schulten*, 104 U. S. 410; *Railroad Company* v. *Koontz*, 104 U. S. 5.

We are not concerned here with the proofs as to prejudice or local influence.

By section 4272 of the Civil Code of Alabama, it is provided that: "Upon the death of a testator, any executor, devisee, or legatee named in the will, or any person interested in the estate, may have the will proved before the proper Probate Court." As Mrs. Fennell was an inhabitant of Madison County at the time of her death, the Probate Court of that county was the proper Probate Court, § 4273; and as Walter E. Jordan and Llewellyn Jordan were named executors, and Llewellyn Jordan was the sole devisee and legatee, either of them could propound the will for probate. By section 4284 it was provided that: "Whenever

an application is made to prove a will in this State, at least ten days' notice must be given to the widow and next of kin, or to either of them, residing and being within the State, before such application is heard." In this case Mrs. McDonnell was the next of kin and sole heir at law, and was duly notified.

Section 4287 provides that: "A will, before the probate thereof, may be contested by any person interested therein, or by any person who, if the testator had died intestate, would have been an heir or distributee of his estate, by filing in the court where it is offered for probate allegations in writing that the will was not duly executed, or of the unsoundness of mind of the testator, or of any other valid objection thereto; and thereupon an issue must be made up, under the direction of the court, between the person making the application, as plaintiff, and the person contesting the validity of the will, as defendant; and such issue must, on application of either party, be tried by a jury."

Section 4298 reads that: "Any person interested in any will, who has not contested the same under the provisions of this article, may, at any time within eighteen months after the admission of such will to probate in this State, contest the validity of the same by bill in chancery, in the district in which such will was probated, or in a district in which a material defendant resides."

Mrs. McDonnell filed her allegations in writing contesting the will on the grounds that it was not signed by the subscribing witnesses in the presence of the alleged testatrix; nor by testatrix in the presence of the subscribing witnesses; nor was the alleged will signed by the witnesses at the request of the testatrix; nor by the subscribing witnesses in the presence of each other and in the presence of the testatrix; that the testatrix at the time the alleged will was signed and executed was of unsound mind and memory and not mentally capable of making a will; that the execution of the will was procured by fraud and undue influence of Llewellyn Jordan; and that the paper propounded was not the last will and testament of Mrs. Fennell; and she demanded a jury trial. The cause was duly set down for trial as between W. E. Jordan, proponent, and

Ada F. McDonnell, contestant, and was subsequently tried, the trial continuing some days, and on April 15, 1897, the jury being unable to agree upon a verdict, was discharged.

After this mistrial Walter E. Jordan applied to the Probate Court to allow him to make Llewellyn Jordan a party defendant to his petition that the will be admitted to probate. As Llewellyn Jordan was a co-executor, and the sole devisee and legatee, the Probate Court, on the third of August, declined to grant the application. If Llewellyn Jordan had applied to be formally admitted as co-proponent, it must be assumed that he would have been permitted to become such of record, but he made no such application. Then, on August 4, the paper purporting to be an "answer" of Llewellyn Jordan was filed by the clerk, without leave, or knowledge of the court, and on the same day was struck from the files as improvidently placed thereon. The succeeding day, August 5, Walter E. Jordan renounced the executorship, and asked that letters issue to his co-executor, Llewellyn Jordan. August 12 the order of removal was entered by the Circuit Court.

The contention of plaintiff in error is that the proceeding in the Probate Court of Madison County was simply a proceeding to establish and probate the will and as such was not a "suit of a civil nature, at law or in equity," and therefore not removable; that if the proceeding were otherwise removable, Llewellyn Jordan was not a defendant and could not remove; and that the application for removal came too late.

The decisions of the Supreme Court of Alabama recognize that an application for the probate of a will is a proceeding *in rem*, but it is held that it becomes a suit *inter partes* where there is a contest, that is, "a suit between the party alleging the existence of the will and the contestant." And that the result of the statutory provisions is to afford two modes of contest, in the Probate Court before the will has been proved, or in the Chancery Court after probate by the institution of a suit by those who were not parties to a contest in the Probate Court. *Knox* v. *Paull*, 95 Ala. 505, and cases cited.

Undoubtedly the courts of the United States possess no jurisdiction over an *ex parte* application for the probate of a will,

that is, for the proof thereof in common form, which is purely a proceeding *in rem;* but it is insisted by defendant in error that, by the institution of a contest, a case of controversy *inter partes* arises, which may be removed to the Circuit Court just as such a contest may be under the state statute removed by change of venue from the Probate Court, where the will is propounded, to the Probate Court of another county, and that the judgment of the Federal court in such a case must be recognized by the Probate Court of original jurisdiction, just as by statute the judgment of another Probate Court to which the proceeding has been remitted is certified to that court that the will may be probated or rejected as that judgment is for or against the validity. Code 1896, § 4296.

Assuming, without deciding, this to be so, the question presents itself as to the position occupied by the proponent and the contestant, respectively, and the statute says that on a contest on admission to probate, "an issue must be made up, under the direction of the court, between the person making the application as plaintiff, and the person contesting the validity of the will, as defendant."

And the issue on this contest was made up by the Probate Court of Madison County accordingly.

Notwithstanding this, defendant in error contends that the contestant is the real plaintiff, and that, within the meaning of the act of Congress in respect of removals, "the contestee is a defendant because he is brought into court against his will by the necessity of defending his right under the will, and his involuntary presence there subjects him to the local prejudice and influence, protection against which is the object of the statute."

In this connection it is proper to say that it is obvious on the face of these proceedings that the effort of Llewellyn Jordan to become a party to the record was so limited to being made such in a particular capacity as to clearly indicate that it was with the object of making the application for removal. But whether as co-executor or as sole legatee and devisee, his appearance in the cause would be as proponent of, or on behalf of the will, and not against it, and without going into the au-

thorities as to where the burden of proof lies when a contest is initiated as to the validity of a will, when it is presented for probate, and even conceding that the specific provision of this state statute may be disregarded, we are nevertheless of opinion that the application to remove came too late.

Under the statutes of Alabama, Llewellyn Jordan might have propounded the will, either as executor or legatee. He might have intervened as interested, if he had feared that his co-executor, who did propound the will, would not do justice, of which there is no pretence here. But he could not lie by, permit the will to be propounded, a contest to be initiated, and a trial had, and at that stage intervene and remove the case.

This was a will and testament, disposing of personal as well as of real property; and was propounded by one of two executors named therein. The statute required notice only to the widow and next of kin, and not to beneficiaries under the will.

There is nothing whatever in the evidence to indicate that Llewellyn Jordan was in fact ignorant of the will, of its presentation for probate, or of the initiation of the contest. The presumptions are against him, and he was at least so far represented by his co-executor that when he applied to come in, and treated the case as if he had come in, he took his place by intervention subject to such disabilities as to the right of removal as then existed.

In *Hanrick* v. *Hanrick*, 153 U. S. 192, 197, it was said: "The act of March 3, 1887, c. 373, corrected by the act of August 13, 1888, c. 866, was intended, as this court has often recognized, to contract the jurisdiction of the Circuit Courts of the United States, whether original over suits brought therein, or by removal from the state courts. It not only amends the act of 1875; but it allows to none but defendants the right to remove any case whatever, and, by new regulations of removals for prejudice or local influence, supersedes and repeals the earlier statutes upon this subject. 24 Stat. 553; 25 Stat. 434; *Smith* v. *Lyon*, 133 U. S. 315; *Fisk* v. *Henarie*, 142 U. S. 459; *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454."

In *Fisk* v. *Henarie*, there cited, this court ruled that the words in the act of March 3, 1887, as corrected by the act of

Statement of the Case.

August 13, 1888, "at any time before the trial thereof," used in regard to removals "from prejudice or local influence," require the application to remove to be filed before or at the term at which the cause could first be tried and before the trial thereof. Tested by that ruling this application to remove came too late.

The judgment is reversed and the cause remanded to the Circuit Court with directions to remand it to the Probate Court of Madison County, Alabama.